TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted] 44.

THE UNITED STATES, APPELLANT,

vs.

R. F. ANDREWS & COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 25, 1908.

(20,278)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 308.

THE UNITED STATES, APPELLANT,

vs.

R. P. ANDREWS & COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

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Court of Claims.

R. P. ANDREWS AND COMPANY, A CORPORATION, claimant,
vs.
THE UNITED STATES.
} No. 22937.

I. *Petition and Exhibits, A, B, and C.—Filed July 28, 1902.*

The claimant, R. P. Andrews and Company, respectfully represents:

1. That it is a body corporate, duly created, organized, and existing under and by virtue of the laws of the State of Virginia, and doing business, as such corporation, in the District of Columbia, as a wholesale dealer and contractor in paper and stationery; and it has at all times borne true allegiance to the Government of the United States.

2. That on and prior to August 17, A. D. 1901, claimant was furnishing and supplying to defendant divers papers and stationery, under contracts in that behalf, for use in various of its Departments, among others, the Government Printing Office, at Washington, D. C.;
2 and, on said last-named date, defendant, through its duly authorized agent in that behalf, solicited claimant to furnish and supply, for use in its public printing office, at Manila, P. I., certain papers of described kinds, qualities, and quantities, at the same prices then being paid claimant for similar papers so then being furnished and supplied by it to the Government Printing Office, at Washington, D. C., as aforesaid, plus freight from New York to Manila, P. I.

A true and correct copy of said request, so made by defendant, as aforesaid, is hereto attached, made part hereof, and marked "Exhibit A."

3. That, being so thereunto solicited and requested, as aforesaid, claimant, on August 28, A. D. 1901, agreed to furnish said papers at the prices aforesaid, plus freight, from New York to Manila, P. I.; except as to certain thereof (not embraced herein), in respect of which claimant quoted a different rate.

A true and correct copy of said proposal and agreement, so made by claimant, in response to the request aforesaid, is hereto attached, made part hereof, and marked "Exhibit B."

4. That thereupon, and on said last-named date, defendant duly accepted said proposal and agreement, and directed claimant to make shipments of said papers, the cases containing the same to have marked thereon a designation of number, contents, and weight, also the address "Governor W. H. Taft, Manila, P. I.;" and further directed claimant to send the same for shipment to Barber & Co., steamship agents, Pier B, Pennsylvania docks, Jersey City, N. J., the latter being the agents of defendant in that behalf.
3 A true and correct copy of said acceptance, order, and direction, is hereto attached, made part hereof, and marked "Exhibit C."

5. That in compliance with said order and direction, claimant shipped, among others, white linen map paper (tub-sized and pole-dried), as follows: 100 reams, 38 x 48 inches, 96 pounds (lot 16); 250 reams, double royal, 24 x 38 inches, 48 pounds (lot 17); and 150 reams, 30 x 42 inches, 35 pounds (lot 18); the same aggregating 26,850 pounds; for which

defendant had, as aforesaid, contracted and agreed to pay claimant the sum of eleven and one-half (11½) cents per pound (being the same price then paid claimant for the same kind and quality of paper furnished and supplied by it at the Government Printing Office, at Washington, D. C., as aforesaid); the same aggregating the sum of $3,087.75; in addition to which, defendant contracted and agreed to reimburse claimant the freight paid by it thereon from New York to Manila, P. I., as herein stated.

That, in further compliance with said order and direction, claimant caused said paper to be properly packed in cases for export shipment, said cases having thereon a designation of number, contents, and weight, also the address "Governor W. H. Taft, Manila, P. I.;" and made delivery thereof, as so directed as aforesaid, to defendant, through its specially designated agents in that behalf, Barber & Co., steamship agents, at Pier B, Pennsylvania Docks, Jersey City, N. J.; and claimant prepaid the freight thereon from New York to Manila, P. I., amounting to the sum of $197.35, upon the promise and agreement of defendant to reimburse it therefor, as aforesaid; and claimant thereupon delivered to defendant bills of lading, in duplicate, for said shipment from New York to Manila, P. I., consigned to defendant, as aforesaid.

4 6. That the paper so furnished, supplied, and delivered by claimant to defendant, as aforesaid, was of the kind, character, description, quantity, and quality, according to sample, and in strict accord with the contract aforesaid.

7. Claimant further states that it heretofore submitted to defendant, in pursuance of its requirement in that regard, bill, in duplicate, for the supplies so furnished, as aforesaid, amounting to said sum of $3,087.75, and for the freight so paid by it, as aforesaid, amounting to said sum of $197.35; and that said amounts are and long since have been overdue and payable; but that although frequently requested so to do, the defendant hath hitherto wholly neglected and refused, and still does neglect and refuse to pay claimant for the paper so furnished and supplied it, as aforesaid, or to reimburse it the amount of freight so paid by it, as aforesaid, or any part of either thereof; and the entire amount thereof, to-wit, the sum of $3,285.10, remains and is wholly overdue and unpaid.

8. Claimant further avers that it is the sole owner of said claim; that no transfer or assignment of the same, or of any part thereof, or of any interest therein, has ever been made by it; and that it is justly entitled to recover from defendant the amount herein claimed, to-wit, the sum of $3,285.10, after allowing just credits and set-offs.

Wherefore, claimant prays that judgment may be entered herein against the United States, in favor of claimant, R. P. Andrews and Company, in the sum of three thousand two hundred and eighty-five dollars and ten cents ($3,285.10).

Attest:

[SEAL.]

R. P. ANDREWS AND CO. (Inc.),
Claimant.
L. R. VINTON, *Secretary.*
By R. P. ANDREWS, *President.*

A. A. HOEHLING, JR.,
Attorney for Claimant.

5 DISTRICT OF COLUMBIA, *ss:*

I, Ross P. Andrews, on oath, say that I am president of the R. P. Andrews and Company, a body corporate, duly created, organized, and existing under the laws of the State of Virginia; that I have personal knowledge of the matters and things set forth in the foregoing petition, and that the same are true as I verily believe.

ROSS P. ANDREWS.

Subscribed and sworn to before me this 26th day of July, A. D. 1902.

[SEAL.] H. R. HOWENSTEIN,
Notary Public, D. C.

Post-office address of claimant: R. P. Andrews & Company, 627 Louisiana avenue N. W., city.

Post-office address of attorney for claimant: A. A. Hoehling, jr., 1416 F street N. W., city.

EXHIBIT A.

(Circular D.)

WAR DEPARTMENT, OFFICE OF THE SECRETARY,
DIVISION OF INSULAR AFFAIRS,
Washington, D. C., August 17, 1901.

R. P. ANDREWS AND CO.,
627 Louisiana Avenue, Washington, D. C.

GENTLEMEN: Under instructions from the Chief of Division of Insular Affairs I write you as follows:

Will you furnish for the use of the Philippine Public Printing Office, Manila, P. I., articles called for in the inclosures 1 and 2, f. o. b. Manila, at the price at which the same is now furnished to the Government
6 Printing Office, Washington, D. C., plus freight from New York, payment to be made from Philippine funds on invoice verification at Manila, P. I.?

Inspection at Insular Division, where samples are to be sent.

When can supplies be shipped from port of departure ?

Bills for supplies to be submitted, in duplicate, to the Chief of Division of Insular Affairs for verification of prices at Government Printing Office rates.

Copies of bills of lading from New York to be submitted, in duplicate, to Chief of Division of Insular Affairs for verification.

Very respectfully,

JOHN S. LEECH,
Supt. of Phil. Public Printing Office.

CHIEF OF DIVISION OF INSULAR AFFAIRS:

SIR: I hereby agree to comply with the above.

NOTE.—Inclosures 1 and 2 here omitted; see under Exhibit C, post.

EXHIBIT B.

R. P. Andrews and Company. [Incorporated.] Wholesale paper and stationery. Contractors for Government supplies, and manufacturers of "The Arlington" stationery. 627–629 Louisiana ave. and 628–630 D st. N. W. Positively no goods sold at retail. Telephone 595 East. The wholesale house.

7 WASHINGTON, D. C., *August 28, 1901.*

CHIEF OF DIVISION OF INSULAR AFFAIRS,
War Department, City.

DEAR SIR: Replying to your favor of the 17th instant, Circular D, we beg to advise that we will furnish the different lots of paper called for in enclosures 1 and 2, which accompanied said circular, at the prices for which the same is now being furnished to the Government Printing Office, Washington D. C., plus freight rate from New York to Manila, P. I., except lots 7 to 15, inclusive, which we will furnish you at 4 5-10 cents per pound, and lots 20 and 21, which we will furnish at 6 8-10 cents per pound. All other lots mentioned we will, as stated above, furnish at the same prices that the same class of goods are being furnished to the Government Printing Office, plus, as stated above, the freight from New York to Manila, P. I. Payment to be made from Philippine funds on invoice verification at Manila, P. I. Inspection at Insular Division, where samples are to be sent. Bills for supplies to be submitted in duplicate to the Chief of Division of Insular Affairs for verification of prices at Government Printing Office rates. Copies of bills lading from New York to be submitted in duplicate to Chief of Division of Insular Affairs for verification.

We can have the goods ready for shipment October 1st to November 15th.

Very truly, yours,

R. P. ANDREWS AND CO. (Inc.),
Prest.

Dictated by R. P. A.

8 EXHIBIT C.

(Circular E.)

WAR DEPARTMENT, OFFICE OF THE SECRETARY,
DIVISION OF INSULAR AFFAIRS,
Washington, D. C., August 28, 1901.

R. P. ANDREWS AND CO.,
627 Louisiana Avenue, Washington, D. C.

GENTLEMEN: Please deliver, f. o. b. Manila, P. I. (via Suez Canal), the following:

Articles called for in inclosures 1 and 2.

To be shipped between October 20 and November 1, 1901.

Quality of goods furnished will be considered in making future orders.

Please acknowledge receipt of this circular by return mail.
To be properly packed for export shipment.
Ship care Barber & Co., steamship agents, Pier B, Pennsylvania docks, Jersey City, N. J. (see note enclosed).
Marked as follows:

No. .
Governor W. H. Taft,
Manila, P. I.

Contents, .
Weight, lbs.

For Philippine public printing plant.
As per your agreement, in your letter dated August 28, 1901, now on file in this office.

Very respectfully,

CLARENCE R. EDWARDS,
Chief of Division of Insular Affairs.

9 [Inclosures.]

NOTE.

Care Barber & Company, steamship agents, Pier B, Pennsylvania Docks, Jersey City, N. J.

A special arrangement has been made so that after f. o. b. delivery as above, at Jersey City, the freight rate for the transportation of these supplies and equipment of the Manila Printing Office will not be higher than $11.05 per ton (dead weight), and possibly less. Rate for measurement freight to be on a correspondingly low basis, in accordance with the space occupied. Therefore the Philippine government will, upon invoice verification at Manila, reimburse you for the cost of this ocean shipment.

[Inclosure 1.]

R. P. Andrews and Co., 627 La. Ave., Washington, D. C.

* * * * * * *

Lot No.	Quantity required.	Description.	Per item. Dolls. Cts.	Aggregate Dolls. Cts.
		Linen map paper. (Tub-sized and pole-dried.)		
16	100 reams,	White, 38 x 48 inches, 96 lb.	$11\frac{5}{6}$ c. per lb.	$3,087.75
17	250 "	" Double royal, 24 x 38 inches, 48 lb.		
18	150 "	" 30 x 42 inches, 35 lb.		

* * * * * * *

[Inclosure 2.]

* * * * * * *

10 II. *Traverse—Filed November 28, 1905.*

In the Court of Claims of the United States. Term, A. D. 1904–1905.

R. P. ANDREWS & CO.
vs.
THE UNITED STATES. } No. 22937.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

III. *Argument and submission of cause.*

On the 28th day of November, 1905, this cause was argued by Mr. A. A. Hoehling for the claimant and by Mr. Charles F. Kincheloe for the defendants and submitted.

11 IV. On the 18th day of December, 1905, the court filed its findings of facts and conclusion of law and ordered judgment to be entered for the claimant in the sum of three thousand two hundred eighty-five dollars and ten cents ($3,285.10). The court filed the following

OPINION.

Per CURIAM:

The contract in this case consists of the two letters, set forth in the preceding findings of August 17, 1901, and of August 28, 1901. It should be understood that the initials "f. o. b. Manila" in the first letter mean that the articles called for will be delivered free of freight at Manila, and that the words "on invoice verification at Manila" in both letters mean that the public printing office in Manila is to have the opportunity of verifying the invoice by examining packages of goods before payment.

The goods in this country were to be inspected at the Insular Division in this country, where samples were to be sent. Bills for supplies were to be submitted in duplicate to the Bureau "for verification of prices at Government Printing Office rates," and "bills of lading from New York to be submitted, in duplicate, to Chief of Division of Insular Affairs for verification." The price was to be the price which the Government Printing Office paid for similar goods "plus freight rate from New York to Manila." The vendors were to prepay the freight and add it to the the Government Printing Office rate. The purchaser was to pay the total amount, which constituted, according to the contract, the price of the goods.

The general rule in such cases is that title passes on delivery of the goods to the carrier if nothing more remains to be done by the vendor. The claimants contend that nothing remained to be done by them; that their contract required them to submit samples for inspection to the Insular Bureau; to deliver the goods to a designated carrier, and prepay

the freight, all of which things they did. They also contend that "invoice verification at Manila" was not something to be done by the vendors to the goods, but something to be done concerning the invoice by the vendees,
and, consequently, that the title passed when the goods were
12 delivered on board the designated vessel and the freight paid;
that the vendors had then no further control of the goods, and that they were then at the risk of the purchaser.

On the part of the defendants it is contended that something remained to be done before the defendants should accept the goods, viz, that they should be reexamined in Manila, and that by the terms of the contract the defendants could not be required to make payment until that was done.

To this the claimants reply that the goods were carried to Manila on a designated vessel, as required by the contract; that the defendants did acquire thereby all that the contract assured to them, viz, the right and opportunity to open the packages and verify the invoice; that this is not the case of goods lost at sea (where the question raised by the defendants might be involved), but is simply the case of goods delivered and transported according to the very terms of the contract, whereby the defendants acquired possession of the goods and the opportunity to verify the invoice, and where they examined the goods and sold them in their damaged condition. If the contract had been according to the usage of merchants, it would have been in form that the price of the goods should be at Government Printing Office rates, with a provision, distinct from the price, that the vendors should prepay the freight and charge it to the vendees. The defendants' officers so understood it; for with their orders to ship goods and pay freight they expressly said, "the Philippine government will, upon invoice verification at Manila, reimburse you for the cost of this ocean shipment."

It is a question in this case whether this contract was anything more than the embodiment of ordinary commercial usage—whether the difference in form is one of substance.

The defendants' officers, as consignee, also treated the goods as goods belonging to the Government by subjecting them to the condemnation of boards of survey, and by selling them without seeking authority for so doing from the claimants, and by neglecting to account for the proceeds thereof.

The case is not as clear as is desirable, and the members of the court are not fully agreed in regard to it; but upon all the facts considered the judgment of the court is that the claimants recover judgment in the sum of $3,285.10.

HOWRY, J., did not sit in this case, and took no part in its decision.

V. *Order of court withdrawing former findings of fact and substituting amended findings.*

On April 9, 1906, on defendants' motion for a new trial, it was ordered that said motion be overruled, that the former findings of fact filed in the above-entitled cause December 18, 1905, be withdrawn, and that the following findings be subsituted therefor.

The judgment as originally entered to stand.

BY THE COURT.

13 VI. *Findings of fact and conclusion of law—Filed by the court.*

R. P. ANDREWS AND COMPANY, A CORPORATION,
v.
UNITED STATES. } No. 22937.

I.

The claimant company is a body corporate, duly created, organized, and existing under the laws of Virginia, and doing business in the District of Columbia as a wholesale dealer and contractor in paper and stationery; it has at all times borne true allegiance to the Government of the United States; it is the sole owner of the claim embraced in this suit, and no transfer or assignment thereof, or of any interest therein, has ever been made by it.

II.

On May 5, 1901, the Secretary of War received from Hon. Wm. H. Taft, then president of the Philippine Commission, at Manilla, Philippine Islands, the following cablegram:

"SECWAR, *Washington:*

"Anomalous conditions convince Commission better and more economical to establish government printing office. Need foreman or superintendent. Isaac C. Haas, 1473 Kenesaw avenue, Washington. Recommend ask investigation as to qualifications and recommendations of him, or some other, to purchase outfit and come here as superintendent; probably salary not exceeding two thousand; transportation paid according to law.

"TAFT."

In response to said cablegram, the Secretary of War directed the Insular Bureau of the War Department to purchase and forward to Manila the necessary machinery, equipment, and supplies for the establishment and operation of such printing office, and also to secure the services of a competent force of operators therefor; which duty was performed by said division.

14

On and prior to August 17, 1901, claimant was furnishing and supplying defendants divers papers and stationery, under contract, for use in various of its Departments; and, thereupon, the Chief of the Division of Insular Affairs solicited claimant to furnish and supply, for use in said Philippine Public Printing Office, being established at Manila, Philippine Islands, certain papers of described kinds, as follows:

(Circular D.)

WAR DEPARTMENT, OFFICE OF THE SECRETARY,
DIVISION OF INSULAR AFFAIRS,
Washington, D. C., August 17, 1901.

R. P. ANDREWS AND CO.,
627 Louisiana avenue, Washington, D. C.

GENTLEMEN: Under instructions from the Chief of Division of Insular Affairs I write you as follows:

Will you furnish for the use of the Philippine Public Printing Office, Manila, P. I., articles called for in the inclosures 1 and 2 f. o. b., Manila,

at the price at which the same is now furnished to the Government Printing Office, Washington, D. C., plus freight from New York; payment to be made from Philippine funds on invoice verification at Manila, P. I.

Inspection at Insular Division, where samples are to be sent.

When can supplies be shipped from port of departure ?

Bills for supplies to be submitted, in duplicate, to the Chief of Division of Insular Affairs, for verification of prices at Government Printing Office rates.

Copies of bills of lading from New York to be submitted, in duplicate, to Chief of Division of Insular Affairs for verification.

Very respectfully,

JOHN S. LEECH,
Supt. of Phil. Public Printing Office.

III.

In reply claimant, on August 28, 1901, submitted a proposal as follows:

WASHINGTON, D. C., *August 28, 1901.*

CHIEF OF DIVISION OF INSULAR AFFAIRS,
War Department, City.

DEAR SIR: Replying to your favor of the 17th instant, Circular D, we beg to advise that we will furnish the different lots of paper
15 called for in enclosures 1 and 2, which accompanied said circular, at the prices for which the same is now being furnished to the Government Printing Office, Washington, D. C., plus freight rate from New York to Manila, P. I., except lots * * *. All other lots mentioned we will, as stated above, furnish at the same prices that the same class of goods are being furnished to the Government Printing Office, plus, as stated above, the freight from New York to Manila, P. I. Payment to be made from Philippine funds on invoice verification at Manila, P. I. Inspection at Insular Division, where samples are to be sent. Bills for supplies to be submitted in duplicate to the Chief of Division of Insular Affairs for verification of prices at Government Printing Office rates. Copies of bills lading from New York to be submitted in duplicate to Chief of Division of Insular Affairs for verification.

We can have the goods ready for shipment October 1st to November 15th.

Very truly, yours,

R. P. ANDREWS AND CO. (Inc.)
R. P. ANDREWS, *Pres't.*

IV.

On the same date (August 28, 1901), said Chief of the Division of Insular Affairs wrote claimant as follows:

(Circular E.)

WAR DEPARTMENT, OFFICE OF THE SECRETARY,
DIVISION OF INSULAR AFFAIRS,
Washington, D. C., August 28, 1901.

R. P. ANDREWS & Co.,
627 Louisiana avenue Washington, D. C.

GENTLEMEN: Please deliver f. o. b. Manila, P. I. (via Suez Canal), the following:

Articles called for in inclosures 1 and 2.

To be shipped between October 20 and November 1, 1901.

Quality of goods furnished will be considered in making future orders.

Please acknowledge receipt of this circular by return mail.

To be properly packed for export shipment.

Ship care Barber & Co., steamship agents, Pier B, Pennsylvania docks, Jersey City, N. J. (See note inclosed.)

Marked as follows:

No. , Governor W. H. Taft, Manila, P. I.

Contents, ; weight, lbs.

For Philippine public printing plant.

As per your agreement in your letter dated August 28, 1901, now on file in this office.

Very respectfully,

CLARENCE R. EDWARDS,
Chief of Division of Insular Affairs.

16 [Inclosure 1.]

R. P. Andrews & Co., 627 La. ave., Washington, D. C.

Lot No.	Quantity required.	Description.	Per item.	Aggregate.
	*	* * *	* *	*
		Linen map paper.		
		(Tub-sized and pole-dried.)		
			Dolls. cts.	Dolls. cts.
16	100 reams..	White, 38 x 48 inches, 96 lb.....		
17	250 "	White double royal, 24 x 38 inches, 48 pounds.....	11.5c. per lb..	3,087.75
18	150 "	White, 30 x 42 inches, 35 lb.....		
	*	* * *	* *	*

[Inclosure 2.]

* * * * * * *

Note.—(Care Barber & Company, steamship agents, Pier B, Pennsylvania docks, Jersey City, N. J.)

A special arrangement has been made so that after f. o. b. delivery, as above, at Jersey City, the freight rate for the transportation of these supplies and equipment of the Manila Printing Office will not be higher than $11.05 per ton (dead weight) and possibly less. Rate for measurement freight to be made on a correspondingly low basis, in accordance with the space occupied. Therefore the Philippine government will, upon invoice verification at Manila, reimburse you for the cost of this ocean shipment.

V.

Prior to the shipment of the paper in question, claimant received from the division of insular affairs an additional note, as follows:

Note.—(Care Barber & Company, East Central Pier, Brooklyn, N. Y.)

A special arrangement has been made so that after f. o. b. delivery, as above, at Brooklyn, the freight rate for the transportation of these supplies and equipment of the Manila Printing Office will not be higher than $11.05 per ton (dead weight) and possibly less. Rate for measurement freight to be made on a correspondingly low basis, in accordance with the space occupied. Therefore the Philippine government will, upon invoice verification at Manila, reimburse you for the cost of this ocean shipment.

17 VI.

Claimant accepted said order as follows:

WASHINGTON, D. C., *August 30, 1901.*

Colonel CLARENCE R. EDWARDS,
Chief of Div. of Insular Affairs, War Department, City.

DEAR SIR: We beg to acknowledge receipt of your order, Circular E, with inclosures 1 and 2, for paper for Philippine public plant, and desire to state that we will comply with all the provisions contained therein.

Thanking you for same, we are, very truly, yours,

R. P. ANDREWS & Co., Inc.
R. P. ANDREWS, *Pres.*

VII.

In compliance with the contract and the directions received, claimant supplied 500 reams of linen map paper, of the kinds and quality called for by the contract; the same being properly packed for export shipment, marked "Gov. W. H. Taft, Manila, P. I.," in care of Barber & Company, East Central Pier, Brooklyn, N. Y., the freight thereon being prepaid by claimant. The value of the paper at Government Printing Office rates amounted to $3,087.75, and the freight charges on the paper from New York to Manila amounted to $196.35. The clearance papers cost $1, which amount was also paid by claimant.

VIII.

Said shipment was consigned by claimant to 'Gov. W. H. Taft, Manila, P. I.," in accordance with the terms of the contract; and bills of lading, in triplicate, were issued to claimant, accordingly, by the steamship company carrying the shipment, under which delivery of the goods was to be made to said consignee, or his assigns.

IX.

Claimant thereupon delivered duplicate bills of lading, covering said shipment, to the Chief of Division of Insular Affairs, War Department, Washington, D. C., in accordance with the terms of the contract.

18 X.

Barber & Co., steamship agents, as above, forwarded said consignment of paper per S. S. "Indrasamaha," which vessel thereafter arrived at the port of Singapore with a portion of her cargo (including said consignment) badly damaged by water. A part of said consignment, 90 reams, was condemned by a board of survey, convened by the ship's agents, and sold in Singapore. The remainder of the consignment, 410 reams, was reboxed and forwarded to Manila; but, on account of its damaged condition, rendering it unfit for the use for which it was designed, Governor Taft, the consignee, refused to accept it; and the acting civil governor, by executive order, convened an inspection committee to investigate and report as to the condition of the paper, the responsibility therefor, etc. That committee investigated and reported as to the damaged condition of the paper, and the cause thereof, and recommended that the paper be held by the Philippine public printer until the claimant company could be notified (it having no agent at Manila), and could direct what disposition it desired of the paper.

XI.

Following the recommendations of the committee, the said public printer wrote the claimant company, notifying it of the damaged condition of the paper, and requesting to be informed what disposition it desired made of it; and the following letter was also written the claimant company:

WAR DEPARTMENT, OFFICE OF THE SECRETARY,
DIVISION OF INSULAR AFFAIRS,
Washington, D. C., May 31, 1902.

GENTLEMEN: I have the honor to inform you that a letter dated April 14th, 1902, has been received from Mr. John S. Leech, public printer, Manila, P. I., advising this division of the accident which occurred to the S. S. "Indrasamha," which resulted in damaging 500 reams linen paper, valued at $3,285.10, as per your bill of October 24th, 1901.

Mr. Leech requested that you be informed that the paper is damaged so badly that it will be impossible to use any of it; that an insurance

inspector and a Government inspection committee were then
19 surveying and inspecting the damaged goods, and that this action was taken for the protection of the contractors, who had taken the precaution to insure their goods against losses.

Very respectfully, J. VAN NESS PHILIP,
Assistant Chief of Division.

R. P. ANDREWS & Co.,
627 Louisiana avenue, Washington, D. C.

In response to the above letter, claimant wrote the Chief of the Division of Insular Affairs as follows:

WASHINGTON, D. C., *June 7, 1902.*

Lieut. Col. EDWARDS,
Chief Division of Insular Affairs,
War Department, Washington, D. C.

DEAR SIR: We are in receipt of your favor May 31st, No. 5423–1, quoting letter received from Mr. John S. Leech, public printer, Manila, P. I., with regard to map paper, therein stated to have been damaged in transportation on steamship "Indrasamha."

This paper was shipped as per your order, bills of lading being obtained as directed and your instructions carried out implicitly. Your goods were turned over upon direction of your office to Messrs. Barber & Company, your agents in that behalf at Jersey City, N. J., in good order and condition, whereupon our responsibility ceased.

We have the honor, therefore, to request that our bill as rendered be approved for payment.

Kindly advise us also, whether you desire us to make a duplicate of said shipment.

Requesting the favor of an early reply, we are, very respectfully, yours,

R. P. ANDREWS & Co., Inc.
J. GEO. SMITH, *Treas.*

XII.

Said consignment of paper was not insured either by the claimant company, the defendants, or the Philippine government. It does not appear that either the claimant company, the defendant, or the Philippine government ever received any of the proceeds of the sale of the 90 reams of paper, embraced in said consignment, so sold by the ship's agent at Singapore, under the circumstances hereinabove set forth.

The facts in relation to the subsequent disposition of the remaining 410 reams of said consignment of paper, as well the disposition of the proceeds arising from the sale thereof, are as follows:

On May 16, 1903, after the paper had remained in the ware-
20 house of the Philippine public printing office for over a year, and the claimant company had failed to take possession or make any disposition thereof, the Philippine Commission, by resolution of said date (May 16, 1903), authorized the advertisement and sale of said paper at public auction or private sale by the Philippine public printer, and directed that the proceeds of such sale, after deducting costs of sale,

together with storage at a rate of not to exceed $2 per ton per month, should be deposited in the insular treasury to the credit of the claimant company; and that said company should be given notice of the action taken. In accordance with the said resolution the paper was advertised and sold by the Philippine public printer at public sale on May 28, 1903, to the highest bidder for the sum of $250, which amount was not sufficient to cover the costs of storage and sale, and the same was, therefore, turned into the insular treasury as miscellaneous receipts of the Philippine public printing office. On May 29, 1903, the Philippine public printer wrote the claimant company, through the Insular Bureau of the War Department, notifying it of the facts above recited as to the sale of the paper, the disposition of the proceeds of sale, etc., which communication was transmitted to the claimant company by the Chief of the Insular Bureau with letter of transmittal dated July 22, 1903, and the same was received by the claimant company the following day.

XIII.

After the military occupancy of the city of Manila by the forces of the United States Government had been established, an organization for the administration of the affairs of civil government by military authority for the city of Manila and the Philippine Islands was created and established. The jurisdiction of this military government was extended
21 as rapidly as the success of the American forces and the exigencies of the military situation permitted. This military government continued in force up to July 4, 1902. (Warner, Barnes & Co. vs. The United States, 40 Ct. Cls., 11.)

Up to September 1, 1900, the military governor was the exclusive head of the government in the Philippine Islands. From September 1, 1900, to July 4, 1901, that part of the power of government in said islands which was of a legislative nature was, by transfer from the military governor, under order of the President of the United States, vested in and exercised by the Philippine Commission, under and subject to rules and regulations prescribed by the Secretary of War.

From July 4, 1901, to July 4, 1902, the executive authority in all civil affairs in the islands, theretofore exercised by the military governor, were, by order of the President of the United States, vested in and exercised by the president of the Philippine Commission, under the title of Civil Governor of the Philippine Islands, such authority being exercised in accordance with the instructions of the President of the United States, of April 7, 1900, to the Philippine Commission, and subject to the approval and control of the Secretary of War. (Public Laws and Resolutions, U. S. Philippine Commission, September 12, 1900, to October 11, 1901, vol. 1, pp. 3–11, inclusive.)

XIV.

The claimant company has never received any part of the agreed purchase price for said paper, nor for the freight and clearance papers covering said consignment and shipment, prepaid by it, as above.

CONCLUSION OF LAW.

22 Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimants are entitled to recover judgment in the sum of three thousand two hundred and eighty-five dollars and ten cents ($3,285.10).

BY THE COURT.

VII. *Final judgment of the court.*

R. P. ANDREWS AND COMPANY, A CORPORATION, *vs.* UNITED STATES. } No. 22937.

At a Court of Claims held in the city of Washington on the 18th day of December, 1905, judgment was entered for the claimant and subsequently on the 9th day of April, 1906, the court overruled the motion of the defendants for a new trial and ordered that said judgment stand, which is as follows:

The court on due consideration of the premises find in favor of the claimant, and do order and judge and decree that said R. P. Andrews and Company, a corporation, do have, and recover of and from the United States the sum of three thousand two hundred eighty-five dollars and ten cents ($3,285.10).

BY THE COURT.

23 VIII. *Application for and allowance of appeal.*

Term 1905–1906.

R. P. ANDREWS AND COMPANY *vs.* THE UNITED STATES. } No. 22937.

From the judgment rendered in the above-entitled cause on the 9th day of April, 1906, in favor of claimant the defendants, by their Attorney-General, on the 7th day of May, 1906, make application for and give notice of an appeal to the Supreme Court of the United States.

J. A. VAN ORSDEL,
Assistant Attorney-General.

Filed May 7, 1906.

Ordered: That this appeal be allowed as prayed for.

BY THE COURT.

MAY 7, 1906.

32248—06——2

24 In the Court of Claims.

R. P. ANDREWS AND COMPANY (A CORPORATION)
vs.
UNITED STATES. } No. 22937.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law, of the opinion of the court, of the final judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 28th day of May, A. D. 1906.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

25 (Indorsement on cover:) File No. 20273. Court of Claims. Term No. 30[illegible]. The United States, appellant, vs. R. P. Andrews & Company. Filed May 31st, 1906. File No. 20273.

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In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, APPELLANT,
v.
R. P. ANDREWS & CO., APPELLEE. } No. 44.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On May 5, 1901, the President of the Philippine Commission, Hon. W. H. Taft, cabled the Secretary of War, stating that the Philippine Commission deemed it advisable to establish a Philippine government printing office for the Philippine Islands, and requesting him to secure a competent person to purchase the machinery and supplies for the establishment and operation of such office and to go to Manila as foreman, or superintendent, of the office.

In response to this request, the Secretary of War at once placed the matter in the hands of the division of insular affairs of the War Department,

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of which division Col. Clarence R. Edwards was chief, with instructions that the necessary machinery, equipment, and supplies be procured and forwarded to Manila, and also that a competent force be secured for the operation of the office. All of this was done by the insular division, Mr. John S. Leech, of this city, being selected for superintendent of the office.

In the course of securing supplies for the use of said office the insular division, during the month of August, 1901, contracted, by correspondence, for the purchase from the appellee, R. P. Andrews & Co., of this city, of 500 reams of linen map paper at a specified price, amounting in all to the sum of $3,285.10. It was specifically stated and set forth in the correspondence that the paper was *for the Philippine government printing office*, and that it was to be paid for *from Philippine funds*, payment to be made *on invoice verification at Manila*.

From the Government's point of view the contract called for this paper to be delivered by the contractor "f. o. b., Manila," but the contractor contends that delivery was to be made at New York by delivery to the ocean carrier at that point, and this question of point of delivery, and of who bore the risk of the ocean transportation from New York to Manila, is one of the principal points in controversy in the case.

The contractor delivered the paper to the steamship agents at New York, consigned to Governor W. H. Taft, Manila, P. I., in accordance with the

terms of the contract, and prepaid the freight thereon. No insurance appears to have been taken out upon the consignment by either party. The vessel upon which shipment was made arrived at the port of Singapore with a portion of her cargo, including this consignment, badly damaged by water, as a result of which 90 reams of the paper was condemned by a board of survey convened by the ship's agents and sold in Singapore. The remainder of the paper, 410 reams, was reboxed and forwarded to Manila; but on account of its damaged condition, which rendered it unfit for the use for which it was designed, Governor Taft refused to accept it, and an inspection committee was at once convened by order of the civil governor to investigate and report as to the condition of the paper, responsibility therefor, etc. This committee investigated and reported as to the damaged condition of the paper and the cause thereof and recommended that, in view of the contractor's having no agent at Manila, the paper should be held by the Philippine public printer until the contractor could be notified and could direct what disposition of the paper it desired made.

Following this report and recommendation of the committee, the contractor was notified, both by the Philippine public printer and by the insular division of the War Department, at Washington, as to the damage to the paper, etc., and was requested to inform the public printer what disposition it was desired should be made of it. In

response to this notification and request, the contractor wrote the chief of the insular division of the War Department, disclaiming any responsibility for the consignment after its delivery to the shipping agent at New York for shipment, and requesting that payment be made for the paper.

The contractor took no action whatever with reference to the further disposition of the paper; and on May 16, 1903, after the paper had remained in the warehouse of the Philippine public printing office for over a year, the Philippine Commission, by resolution of that date, authorized its advertisement and sale by the Philippine public printer, and directed that the proceeds of the sale, after deducting costs of sale, together with costs of storage at a rate not to exceed $2 per ton per month, should be deposited in the insular treasury to the credit of the contractor, and that the contractor should be given notice of the action taken. The sale was duly advertised by the public printer and the paper was sold at public sale on May 28, 1902, to the highest bidder for $250, which amount was not sufficient to cover the costs of storage and sale, and was therefore turned into the Philippine treasury as miscellaneous receipts of the Philippine public printing office. On May 29, the day following the sale, the Philippine public printer wrote the contractor notifying it of the facts above recited as to the sale of the paper and disposition of the proceeds thereof, which notification was received by the

contractor, through the insular division of the War Department, on July 23, 1902.

The contractor has never received any part of the purchase price of the paper, nor does it appear that either the contractor, the Philippine government, or the United States Government has ever received any part of the proceeds of the sale of the 90 reams of paper condemned and sold by the ship's agents at Singapore.

ASSIGNMENTS OF ERROR.

The Court of Claims erred as follows:

1. In holding the United States to have been a principal party to the contract in question and liable thereon, and therefore a proper party defendant in the suit.

2. In holding that the contractor was not responsible for the delivery of the paper at Manila, P. I., in good condition, and that the risk of damage and loss in its transportation from New York to Manila was in the United States.

3. In holding the United States Government liable for the purchase price of the paper, and in rendering judgment therefor.

BRIEF OF ARGUMENT.

As appears from the assignments of error above, the questions to be determined on this appeal are, first, whether or not the United States Government was a principal party to, and liable upon, the contract in question, and therefore a proper

party to the suit; and second, whether or not, under the contract, it was incumbent upon the contractor, the appellee, to make delivery of the paper at Manila.

UNITED STATES NOT A PRINCIPAL PARTY TO THE CONTRACT, AND THEREFORE NOT A PROPER PARTY TO THE SUIT.

On behalf of the Government it is contended under this head, first, that in making the contract for the purchase of the paper, the Insular Division of the War Department was acting strictly in the capacity of agent for the Philippine government, of which fact the contractor was cognizant, and that the contract was therefore not a contract with the United States, but a contract with the *Philippine Government;* and second, that the United States was not liable for the debts, or upon the contracts, of the Philippine Government; and, third, that there is no basis for a claim for recovery against the United States in the premises.

Insular division acted as agent for Philippine government.

For a thorough understanding on this point, a knowledge of the facts as to the status and duties of the insular division of the War Department is necessary, of which facts the court will take judicial notice. (Greenleaf on Evidence, 12th ed., Secs. 6 and 6a; *Meade* v. *U. S.*, 9 Wall., 691; *De Celis* v. *U. S.*, 13 C. Cls. R., 117, 126; *Fendall* v. *U. S.*, 16 C. Cls. R., 106, 121.)

The history of the insular division, covering its creation, the reasons therefor, and its early duties and subsequent growth, appears in the report of the War Department for the fiscal year ending June 30, 1901 (vol. 1, pt. 1, pp. 772–773); and its status and duties further and more fully appear from pages 739 to 748, id., from which it is apparent that the status and duties of the division were of a dual character, and that while it was a division of the War Department, and therefore primarily an agent of the United States Government, yet it also acted as agent in different matters for the insular governments, and especially for Cuba and the Philippine Government. As stated on page 742, id.—

> It acts for the insular governments in the procurement and transportation of personnel, supplies, and equipment that have to be obtained in the United States—a notable example being the employment and transportation of a thousand teachers, and the purchase and shipment of a complete government printing office for the Philippine Islands.

That the insular division was acting in the capacity of agent for the Philippine Government in contracting for the paper in question, and also that the contractor, the appellee, was cognizant of such fact, clearly appear from the findings of fact made and certified up by the court below.

It appears from Finding II (p. 8, Transcript) that upon receiving the request of Governor Taft—

who was speaking by authority of the Philippine Commission—for the procurement of a superintendent, outfit, and supplies for the establishment and operation of a Philippine public printing office, the Secretary of War turned the whole matter over to the insular division of the War Department, with directions to comply with the request of Governor Taft in the premises. It appears from, and is specifically stated, not only in Finding II of the Court of Claims (p. 8, Transcript), but also in the correspondence both of the insular division and of the contractor, constituting the contract (Findings II, III, IV, V, VI, pp. 8–11, Transcript), that the furnishing of the paper was *for the Philippine public printing office* at Manila; and it is further specifically stated and provided in and by said correspondence and contract that payment for the paper was to be made *from Philippine funds*.

If it was not intended and understood by and between the insular division and the contractor that it was a contract between the contractor and the *Philippine Government*, for which Government the insular division was acting merely as agent, then why any such expressions and provisions as the above, showing for whom the paper was purchased, and from what funds payment for it was to be made? Upon such a view of the case these provisions would be wholly superfluous and meaningless. We submit that their purpose was obviously to do just what we contend they *did* do—that is, put the contractor upon notice that

the insular division was acting merely as agent for the Philippine government in the matter, and that the contractor must look to that government, as the principal, for the payment of the contract price.

As further indicating that the status of the insular division in the matter was that of an agent for the Philippine government, attention is called to the subsequent action of the Philippine public printer in notifying the contractor of the damage and sale of the paper, by letter *direct to the contractor*, though forwarded through the insular division.

And as the best of evidence that it was understood by all concerned that the insular division was acting merely in the capacity of agent for the Philippine government, we have the fact that the contract was not reduced to writing and signed by the parties, as required by section 3744 Revised Statutes in the case of contracts made by the War Department to which the Government is a party. If it had been a contract to which the United States Government was a party, the making of it as it was made would have been a violation of duty and law on the part of both the Government officers and the claimant (*Clark* v. *United States*, 95 U. S., 542; *South Boston Iron Co.* v. *United States*, 118 U. S., 37); and as such a deliberate violation of law is not to be presumed—and especially since the contract would have been null and void—

it is to be presumed that it was understood that it was not a contract with the United States Government, but a contract with the Philippine government, for which the officers of the United States were acting as agent.

In conclusion on this point, we submit that it must be held that the insular division acted in the matter strictly as agent for the Philippine government, of which fact the contractor had knowledge; that the contract was therefore a contract between the *Philippine Government* and the contractor; and that as it is a well settled rule of law that an agent can not be held personally liable on a contract made for his principal where his principal and the fact of his agency were disclosed to the other party, it is the Philippine Government and not the Insular Division—or the United States—which is liable on the contract. (*Whitney* v. *Wyman*, 101 U. S., 392; *Cliquot* v. *U. S.*, 3 Wall., 114; *U. S.* v. *Burdett*, 9 Pet., 682.)

United States not liable on contract of Philippine government.

Being a contract between the appellee and the *Philippine Government*, the next question to be determined is whether or not the United States Government was, at that time, liable for the debts incurred by the Philippine Government. The Philippine Islands were, at the time of the making of this contract, a distinct political Territorial entity, having practically as complete a civil Ter-

ritorial government as had any of the organized continental Territories of the United States. The relations existing between them and the United States, and the obligations of the United States Government to the islands, and its liabilities for and on account of them and their government, were substantially the same as in the case of the organized continental Territories of the United States. The United States was therefore no more liable on this contract of the Philippine Government than it would be upon a similar contract made by the government of the Territory of New Mexico or of Arizona.

It is well settled that all territory acquired by the United States is held subject to legislative control by Congress; hence, upon the acquisition of the Philippine Islands by the Treaty of Paris, Congress might have provided by law for the governmental regulation and control of the islands. However, and apparently on account of the insurrection existing in the islands, Congress took no action in the matter for about two years after the treaty, leaving the government of the islands wholly in the hands of the President, who was working all the time toward the perfection of complete civil government, as appears from all official Presidential acts and orders relating to the islands.

Following the capture of Manila by Admiral Dewey the President issued the order of May 19,

1898, to the Secretary of War, relative to the policy to be pursued during the military occupation of the islands as Spanish territory. (Richardson's Messages and Papers of the Presidents, vol. 10, p. 208.) On December 21, 1898, following the acquisition of the Philippine Islands by the treaty of peace, an Executive order was issued extending to the whole of the ceded territory the military government theretofore maintained in the city, harbor, and bay of Manila. (Id., p. 219.) Congress having failed to enact any legislation for the government of the Philippine Islands, the President continued, through the military arm of the Government, to govern said islands until March 16, 1900, when the President appointed the second Philippine Commission, popularly known as the Taft Commission, and transferred to it on September 1, 1900, the legislative power theretofore exercised in civil affairs by the military government of the islands.

The grant of authority and the instructions to the Commission are contained in President McKinley's letter of April 7, 1900, to the Secretary of War (Report of War Department, 1900, vol. 1, pt. 1, p. 72), in the introductory part of which, after stating that the Commission had been created "to continue and perfect the work of organizing and establishing civil government already commenced by the military authorities," subject in all

respects to any laws which Congress might thereafter enact, the President said:

> It is probable that the transfer of authority from military commanders to civil officers will be gradual and will occupy a considerable period. Its successful accomplishment and the maintenance of peace and order in the meantime will require the most perfect cooperation between the civil and military authorities in the island, and both should be directed during the transition period by the same executive department. The Commission will therefore report to the Secretary of War, and all their action will be subject to your approval and control.

It thus appears that after September 1, 1900, the military authorities in the islands exercised but one of the three coordinate functions of government—that is, the executive function. The legislative power was exercised by the Commission, and the judicial power was executed by courts, provided by legislative enactment of the Commission. A complete judicial system was speedily provided for by the Commission after entering upon its service on September 1, 1900.

This semicivil system of political government of the Islands continued until July 4, 1901, during which time, acting under the direction and broad authority contained in the original Presidential instructions of April 7, 1900, and the authority

vested in the President by the Spooner amendment, the Commission took up and vigorously prosecuted the work of organizing and perfecting a complete system of civil government in the Islands to take the place of the system of government left by the Spanish authorities and continued, with some modifications, under the United States military authorities after the ratification of the treaty.

To this end the Commission enacted legislation covering a broad field of important subjects relating to the affairs and government of the Islands. This legislation has been compiled in volumes entitled "Public Laws Enacted by the Philippine Commission;" and among the more important and significant of these laws enacted by the Commission prior to July 4, 1901, are the following:

Act No. 5, of September 19, 1900, for the establishment of a complete civil-service system.

Act No. 12, of October 3, 1900, prescribing method of keeping and rendering accounts.

Act No. 14, of October 10, 1900, providing for the temporary assignment of judges for the Courts of First Instance.

Act No. 20, of October 10, 1900, "An act to reorganize the office of the auditor of the islands."

Act No. 22, of October 15, 1900, appropriating one million dollars for the improvement of the port of Manila.

Act No. 74, of January 1, 1901, establishing a department of public instruction and appropriating money for its support.

Act No. 82, of January 13, 1901, "A general act for the organization of municipal governments in the Philippine Islands," designated as "The Municipal Code."

Act No. 83, of February 6, 1901, "A general act for the organization of provincial governments in the Philippine Islands," designated "The Provincial Government Act."

Act No. 98, of March 9, 1901, to regulate commerce.

Act No. 129, of May 16, 1901, providing for the appointment of a disbursing agent to be resident in Washington, and appropriating fifty thousand dollars for payment for transportation of school-teachers and other employes of the Philippine government.

Act No. 136, of June 1, 1901, providing for the organization of courts.

Act No. 146, of June 21, 1901, creating the office of insular purchasing agent for the government, and making appropriation to carry the act into effect.

The character and scope of the President's letter of instruction of April 7, 1900, to the Philippine Commission, and the action taken and results achieved by the Commission in pursuance thereof, in the perfecting of a system of civil government for the islands, are clearly stated by Secretary Root in his annual report to the President of

November 27, 1900. In this report Secretary Root gives a clear exposition of the civil government established in the Philippine Islands under the authority of the letter of instructions of the President of April 7, 1900, and the Spooner amendment. It appears from this report that a perfect system of municipal government was established under act No. 82, known as "The Municipal Code," which organized the various towns and cities and municipal corporations and established legal government therefor. That a complete system of provincial government had been established under the provisions of act No. 83, since amended in various details by acts numbered 133 and 223. These provincial governments corresponded to counties, departments, or provinces, and were organized with customary corporate powers providing for local officials, as provincial governor, secretary, treasurer, supervisor, &c. The Secretary in this report called special attention to the establishment of a judicial department by which a complete judicial system was organized and placed in operation. This judicial system consisted of a supreme court, composed of a chief justice and six associate justices, a Court of First Instance in each of fourteen judicial districts, and a justice's court in each municipality. The judges are appointed by the Commission. The jurisdiction of these various courts is reviewed in the report of the Secretary, as set forth in the acts of the Commission.

On the 12th of June, 1901, an act (No. 140) was passed defining the judicial districts and fixing times and places where the courts of first instance should be held.

On the 7th of August, 1901, the Commission regulated the practice and procedure of these courts by their act No. 190, entitled "An act to provide a code of procedure in civil actions and special proceedings in the Philippine Islands."

As further stated by Secretary Root, in his annual report to the President in 1901, with special reference to the character of the statutes enacted by the Philippine Commission:

> The statutes thus enacted have become the law of the land in the Philippine Islands and bear the same relation to governmental action and private rights in the archipelago that the statutes enacted by the Congress and the State legislatures in the United States bear within the territory for which they are enacted. Under this system the Philippine Islands have had the practical advantages of having the legislative separated from the executive authority; of having laws matured under the influence of public discussion and deliberation; of having the laws, when adopted, certain, permanent, and known, and of having the moneys of the insular government expended only pursuant to previous appropriations made by law, so that official accountability could be enforced by rigid system of audit, testing the accounts of all disbursing officers from

the lowest to the highest by reference to a fixed standard of lawful authority.

It is particularly to be noted that in the instructions of the President of April 7, 1900, to the Commission, and in the legislation of the Commission thereunder, the greatest practical degree of self-government by the natives was, and has been, provided for, and that in the distribution of power among the different divisions of government provided for and organized under said instructions and legislation all powers which could properly be exercised by the municipality or by the provinces were vested in those divisions or departments of government, while the powers of a more general character were vested in the general or central government. Therefore, in the resulting governmental system the central government of the Islands bears a very similar relation to the different provinces thereof to that of the National Government of the United States to the States and Territories of the Union.

It thus appears that while the *executive* authority of the government of the Islands during the period from September 1, 1900, to July 4, 1901, still remained in the military governor of the islands, yet in all other respects there was a complete system of civil government in the islands.

On March 2, 1901, Congress enacted its first legislation relative to the regulation of civil government in the islands. This legislation, popularly known as the "Spooner amendment," was

contained in the army appropriation act for the fiscal year ending June 30, 1902 (31 Stat. L., 910), and provided, in part, as follows:

> All military, civil, and judicial powers necessary to govern the Philippine Islands, acquired from Spain by the treaties signed at Paris on the tenth day of December, eighteen hundred and ninety-eight, and at Washington on the seventh day of November, nineteen hundred, shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion.

Immediately upon enactment, the provisions of law contained in the Spooner amendment were communicated by the Secretary of War to the Philippine Commission, with the direction that until further orders government in the Islands would continue under the then existing instructions and orders. (Report of Secretary of War, 1901, vol. 1, pt. 1, p. 58.)

On June 21, 1901, the President issued an order providing for the transfer, on July 4, 1901, from the military governor of the islands to the president of the Philippine Commission, all executive authority in civil affairs which had theretofore been exercised by the military governor, and Hon. William H. Taft, the president of the

Commission, was designated and appointed Civil Governor of the Islands. (Id., p. 62.)

This order of June 21 reads as follows:

> On and after the 4th day of July, 1901, until it shall be otherwise ordered, the president of the Philippine Commission will exercise the executive authority in all civil affairs in the government of the Philippine Islands heretofore exercised in such affairs by the military governor of the Philippines, and to that end the Hon. William H. Taft, president of said Commission, is hereby appointed civil governor of the Philippine Islands. Such executive authority will be exercised under and in conformity to the instructions to the Philippine commissioners dated April 7, 1900, and subject to the approval and control of the Secretary of War of the United States. The municipal and provincial civil governments which have been or shall hereafter be established in said islands, and all persons performing duties appertaining to the offices of civil government in said islands, will, in respect to such duties, report to the said civil governor.
>
> The power to appoint civil officers, heretofore vested in the Philippine Commission or in the military governor, will be exercised by the civil governor with the advice and consent of the Commission.
>
> The military governor of the Philippines is hereby relieved from the performance, on and after the said 4th day of July, of the civil duties hereinbefore described, but his

> authority will continue to be exercised as heretofore in those districts in which insurrection against the authority of the United States continues to exist or in which public order is not sufficiently restored to enable provincial civil governments to be established under the instructions to the Commission dated April 7, 1900.

On the 4th day of July, 1901, in accordance with this order, Mr. Taft was inaugurated at Manila as Civil Governor of the islands, and entered upon the performance of his duties as such official, and from this date there was a complete system of territorial civil government, independent of the military authorities in the Islands, composed of the three coordinate branches of government—legislative, executive, and judicial—the legislative department consisting of the Philippine Commission; the executive department, of the Civil Governor; and the judicial department, of the courts established by the legislative enactments of the Commission.

On August 7, 1901, the Philippine Commission further perfected the judicial department of the government by enacting a law (Act No. 190) providing a most exhaustive and complete code of civil procedure for the islands. (Public Laws of the Commission, vol. 1, p. 378.)

Such was the status of the Philippine Islands and government at the time of the making of the contract involved in this suit, August 28, 1901; and in behalf of the United States it is contended that whatever may have been the situation there-

tofore, yet upon the establishment of the complete civil government on July 4, 1901, under the authority and approval of the "Spooner amendment," the Philippine Islands and government became a separate and distinct political entity, under the direct legislative and executive control of the Government of the United States; that the various Executive orders, the legislative acts of the Philippine Commission, and the acts of Congress—and especially the "Spooner amendment"—established a territorial form of government in the Philippine Islands as completely suited to the conditions there existing as can be found in any other territory of the United States; that, as a matter of fact, there is no material difference between the form of government established and then existing in the islands and that established and existing in the Territories of Arizona and New Mexico.

While it is true that in New Mexico and Arizona the laws are enacted by legislatures, yet these legislatures are elected only by virtue of enabling acts of Congress, and their legislative acts are subject to disapproval by Congress. And, further, the salaries of the members of these legislatures, together with other general and necessary expenses of the legislative establishment, are paid by the United States Government out of the National Treasury; while the salaries of the members, together with all other expenses, of the Philippine legislative body—the Philippine Com-

mission—are paid out of the Philippine treasury, supported wholly by Philippine revenues. Congress has a right, and, as a matter of fact, has established different forms of government for different territories; and there is no material difference whether the territorial laws be enacted by legislatures authorized and established by Congress or by commissions appointed by the President and authorized to pass laws, as such laws have no force or effect without the approval of Congress, either expressed or implied.

And further, in the matter of a comparison of the Philippine Government with the governments of the Territories of New Mexico and Arizona, it is to be noted that in one very important respect the Philippine Islands are more independent than these Territories, in that any customs duties collected in Arizona and New Mexico are turned into the National Treasury, while the duties collected in the Philippine Islands form a part of the revenues of the islands, never passing into the United States Treasury at all, and are used for the benefit of those islands alone." And in this connection it is further to be noted that not only the expenses of the legislative branch, but also those of the executive and judicial branches of the Territorial governments of Arizona and New Mexico—that is, the expenses of practically the whole political territorial government proper—are paid *by the United States Government out of the National Treas-*

ury, while all the expenses of the government of the Philippine Islands of every character whatsoever are paid *from the Philippine treasury*, which is kept up and supplied solely by the revenues of the islands.

We submit, therefore, that the complete civil government established July 4, 1901, was a territorial government established under and by the authority of *Congress*, conferred in the "Spooner Amendment," of March 2, 1901 (*Dorr* v. *United States*, 195 U. S., 138); and that thereafter, and at the time of the making of the contract involved in this suit, the relations between the United States and the Philippine Islands were practically, and to all intents and purposes, the same as the relations between the United States and the organized Territories of Arizona and New Mexico, and that the United States can no more be held liable for the debts, or upon the contracts or other obligations of the Philippine Islands than it could upon the obligations of such Territories.

That the United States Government is not liable upon the debts or other obligations contracted by the Territories is obvious. If the Territory of Arizona, which has been given authority by Congress to levy and collect territorial taxes from its citizens for internal improvements and other purposes, should illegally collect taxes from a citizen, it could not be contended that a cause of action would arise against the United States for restitution; or if the Territory should contract a debt

or enter into a contract of any kind, the United States Government could not be held liable thereon.

The status of the Territory with reference to the National Government is very similar to that of a county with reference to the State of which it is a part. Referring to the relations of the organized Territories to the United States Government, Chief Justice Chase, in the case of *National Bank* v. *Yankton County* (101 U. S., 129, 133), says:

> Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations.

That a State is not liable upon the debts or obligations of one of the counties composing it will hardly be disputed.

In the case of *Mills* v. *Board of Commissioners of Hendricks County* (50 Ind., 436) the plaintiff had paid certain illegal State, county, and township taxes. The county taxes were refunded, and the plaintiff brought suit against the county for the recovery of the State and township taxes. The court held, in substance, that the county was not liable for either the State taxes or the township taxes; that the action should have been against the State—or more properly an appeal to the legislature—for the refund of State taxes, an action against the county for county taxes, and

an action against the township for township taxes.

That the National Government is not liable on a contract or other obligation of one of its territorial governments, or of a political subdivision of such territorial government, even though the obligation be authorized by Congress, is well illustrated by the case of *National Bank* v. *Yankton County*, cited above (101 U. S., 129). In this case the Dakota Territorial legislature passed an act authorizing counties and townships of the Territory to vote aid to railroads in the Territory, and under authority of this act Yankton County voted a certain amount of bonds in aid of the Dakota Southern Railroad. Shortly thereafter Congress passed an act disapproving and annulling said act of the Dakota legislature, but confirming and validating the action of Yankton County in the voting of bonds in aid of said railroad. The First National Bank of Brunswick, Me., became the holder and owner of ten of these bonds, aggregating ten thousand dollars, and in a suit by the bank against the county to recover certain installments of interest due on the bonds this court held that the county was liable on the bonds, and gave judgment accordingly. While the question of whether or not the National Government was liable on the obligation or contract of the territorial county was not directly in issue, yet it was indirectly passed upon; for if, as was necessarily

held, the cause of action was rightfully against the county, it necessarily follows that there could have been no cause of action against the National Government.

A case more directly in point, however, is the case of *Barnes* v. *District of Columbia* (91 U. S., 540), which was a personal-injury suit against the District of Columbia on account of injuries sustained by the plaintiff through negligence on the part of the board of public works of the District. At this time the District had, under the District government act of February 21, 1871, a form of government substantially the same as that of the Territories of the United States, there being a governor, a secretary, and other officers appointed by the President, and a legislature composed of two different bodies or houses. The board of public works consisted of the governor and four other members appointed by the President, and their duties were in the main prescribed by Congress. It was contended on the part of the District that under such circumstances, and especially as the District had no power in the matter of the selection of the members of the board or of their continuance in office, the District was not liable for their negligence. This court, however, held that the District was liable for the negligence of the board and gave judgment accordingly. In this case, also, the question of the liability of the National Government upon obligations of the District gov-

ernment was not directly in issue; yet it was necessarily indirectly passed upon and negatived by the court in holding that the District was the party liable in the matter.

The status of the District at that time, with reference to the National Government, and the status of the Philippine Islands at the time of the contract involved in the suit at bar, are so similar that it seems to us this decision of the court in the Barnes case conclusively sustains our contention in the case at bar that the Government is not liable upon the contract of the Philippine Government involved in this suit.

In conclusion on this branch of the case, we submit that the contract involved herein was a contract between the appellee and the *Philippine Government*, upon which the United States Government is in no wise liable, and that the Court of Claims erred in holding to the contrary and in rendering judgment against the Government.

PAPER NOT DELIVERED ACCORDING TO CONTRACT.

But even if the court should hold the contract for the purchase of the paper to have been a contract between the appellee and the *United States Government*, we think it clear that there is yet no right of recovery against the Government, for the reason that under the contract, as we think it must be construed, it was incumbent upon the contractor, the appellee, to deliver the paper at Ma-

nila, in good condition; and that not having done so, the purchase price never came due.

A careful analysis of the contract correspondence, consisting of the four letters set forth in the findings of fact (Transcript, pp. 8 to 11), is necessary to a determination of the question of whether or not it was incumbent upon the contractor to make delivery of the paper at Manila.

The Court of Claims, in its opinion in the case, states that the contract consisted of the two letters of August 17 and August 28, necessarily meaning the first two letters of the series. This conclusion of the Court of Claims was clearly erroneous, and apparently was largely responsible for the court's rendering judgment against the Government. And as a correct interpretation of the contract can be arrived at only by a consideration of all the negotiations leading up to and effecting the contract, let us see by just what negotiations, or letters, the contract was effected.

That no contract results from negotiations between parties until the minds of the parties meet upon all the material terms and conditions involved is a rule of law so well settled and recognized as to call for no supporting argument or citation of authorities; and such being the case, we submit that no contract was effected in this case until the contractor's final letter of acceptance of August 30.

In the opening letter of the correspondence, the insular division's letter of August 17 to the contractor, inquiry was made as to whether the con-

tractor would furnish for the Philippine public printing office certain kinds and quantities of paper at certain prices, and upon certain other terms or conditions therein stated.

Now as to this letter, what was it? Was it an offer, or proposal, on the part of the insular division which the contractor could, by an unqualified affirmative reply have accepted and thus bound the insular division to have taken the paper specified, upon the terms and conditions stated in the letter; or was it merely a preliminary letter of inquiry to the contractor? We think it clear that it was of the latter character (Page on Contracts, sec. 26); and as especially bearing on this point, we call attention to the inquiry in the letter as to when the paper could be furnished by the contractor. One of the cardinal rules in the law of contracts, as to offer and acceptance, is that the offer "must be so complete that upon acceptance an agreement is formed which contains all the terms necessary to determine whether the contract has been performed or not." (Idem, sec. 27); and as time appears from this inquiry in the letter to have been a material element in the matter, this inquiry and the failure in the letter to specify the time for performance, would leave the letter outside of the rule, even though it were otherwise within the rule.

However, further consideration of this point is unnecessary, for the reason that even if the letter could be held to have been an unqualified *offer* from the insular division, the contractor's reply

to it was not such an acceptance as would have effected a contract.

It is fundamental that in order to create a contract acceptance must be positive and absolute and identical with the terms of the contract. "An acceptance to be good must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand." (Anson on Contracts, p. 19, note.) "The acceptance must correspond with the offer at every point, leaving nothing open for future negotiations." (Page on Contracts, sec. 45.)

This reply of the contractor of August 28 fails to come within the rule as above set forth, as one of the principal conditions specified in the letter from the insular division was that the price for *all* the paper be the same as the prices at which the contractor was then furnishing the same kind of paper to the Government Printing Office here, plus the freight rate to Manila; while the contractor, in reply, instead of agreeing to this price, agreed to it for only *a part* of the paper.

Another of the principal conditions specified in the letter from the insular division to the contractor was that delivery of the paper was to be made *f. o. b. Manila*, while the contractor's reply was silent as to the question of where delivery would be made. If by this silence the contractor meant not to agree to delivery being made at Manila, then there was also no meeting of the

minds on this very material question of place of delivery, which is one of the principal questions in controversy in this case, and the main question involved in this branch of the Government's defense.

Here we have two exceedingly important conditions specified in the letter of the insular division which were not agreed to or accepted in the contractor's reply, which fact absolutely negatives the proposition, or conclusion, of the lower court that these two letters created and constituted the contract between the parties.

In view of the above-noted facts, the contractor's reply of August 28, instead of being an acceptance, was a proposal—either an original proposal or a counter proposal; for if the insular division's letter of August 17 be held not a proposal, but merely a preliminary letter of inquiry, the contractor's reply thereto was an original proposal; and if said letter of the insular division is held to be a proposal, then the contractor's reply was a *counter* proposal.

We think it thus clear and conclusive, in any view of the case, that no such meeting of the minds of the parties resulted from these two letters as was necessary to effect a contract.

No contract, therefore, having thus far been effected, we must look to the subsequent negotiations or correspondence to determine when a contract *did* result.

The next letter is the insular division's reply of August 28; and in this letter the insular division repeats the condition of delivery *f. o. b. Manila*, and also includes certain new provisions as to shipment, as follows:

> Shipment to be made via Suez Canal.
>
> Paper to be properly packed for export shipment.
>
> Shipment to be care Barber & Co., S. S. agents, Jersey City, N. J.
>
> Paper to be consigned to Governor W. H. Taft, Manila, P. I.

We think it clear that this letter, again, did not effect a contract, for the reason that it not only did not effect a meeting of the minds of the parties on the question of where delivery was to be made, but also injected into the negotiations the above noted new propositions as to matters of shipment.

As to the question of delivery, the contractor's letter of August 28—to which this letter was in reply—having said nothing about where delivery was to be made, this provision for delivery f. o. b. Manila, in the insular division's reply, left this very material question of place of delivery open and not settled between the parties.

As to the above-noted provisions, or propositions, relative to route of shipment, shipping agent, consignee, etc., these were very material, and not having theretofore entered into the negotiations, there was no agreement of the minds of the parties as to them. Their materiality readily appears

when the early need of the paper and the long distance of the shipment is considered, together with the further facts that the freight charges constituted a part of the purchase price, and better freight rates could be gotten through the shipping agents designated; and while such matters are usually left to the vendor, to whom commercial custom or usage, in the absence of special agreement to the contrary, gives the right of shipping as he may wish, where he is to be responsible for the goods while in transit, yet this right may, as it was in this case, be modified or surrendered to the purchaser by a special agreement between the parties.

There may be some room for question as to whether these provisions should be considered as entering into and becoming a part of the contract requirements, or as merely suggestions or recommendations from the insular division; but the ultimate effect is the same whichever construction be put upon them, as we will see later on; and as the contractor has, in effect, construed them to be compulsory upon it—which they could not be except as a part of the contract—we will accept this construction.

It seems to us conclusive that here again, as to these new matters of shipping agent, route of shipment, etc., there was no agreement of the minds of the parties, and therefore that this letter of the insular division of August 28 did not effect a con-

tract between the parties. The simple and proper test on this point is: Did this letter bind and obligate the contractor to furnish the paper, and to both ship and deliver it as specified therein—that is, to ship by a certain route, through a certain shipping agent to a certain consignee, to neither of which conditions had it ever specifically agreed? The conclusion is irresistible that it of course did not and could not, and therefore that thus far no contract had resulted.

And now we come to the final act and letter in the negotiations—the one which clearly effected and closed the contract—the contractor's letter of August 30. This letter was in reply to the insular division's letter of August 28, containing the unsettled provision for delivery at Manila and the new conditions, or provisions, as to route, shipping agent, etc.; and as it is an unqualified letter of acceptance, specifically stating that the contractor *would comply with all the provisions contained in the said letter of August 28 from the insular division*, it clearly effected a meeting of the minds of the parties on all points, and closed the contract.

It is thus clear that all four of these letters between the parties were part of the contract correspondence and negotiations, and that an interpretation of the contract terms, conditions, and obligations must be based upon all of them.

Contract called for delivery at Manila.

While according to commercial usage, delivery by a vendor to the carrier is, *in the absence of special agreement to the contrary*, delivery to the vendee, yet no one will question the right and power of the parties to vary this rule by contract provisions requiring delivery to be made by the vendor at the point of final destination (*Dunlop* v. *Lambert*, 6 C. & F., 620–622; *Pacific Iron Works* v. *L. I. R. R. Co.*, 62 N. Y., 272); and in any way the contract in the case at bar may be construed, the conclusion is irresistible that it called for delivery *f. o. b. Manila*.

The insular division in its first letter to the contractor, August 17, specified delivery f. o. b. Manila; and the contractor in its reply, August 28, though expressing itself on all the other terms and conditions specified in said letter from the insular division, was silent on this question of place of delivery. Now, if it be held that the contractor by this silence meant not to agree to make delivery at Manila, then there was no meeting, or agreement, of the minds of the parties on this point; and we must look to the subsequent negotiations for such agreement.

In the next letter, the reply of the insular division of August 28, delivery is again positively specified f. o. b. Manila; and as this, then, was contrary to the contractor's proposal, still no agreement or meeting of the minds on this point was effected

by this letter, and we must pass on to the next letter in the contract correspondence.

This next and final letter was the reply of the contractor of August 30. The insular division having in its last letter—and in the very first sentence thereof—again distinctly specified delivery f. o. b. Manila, the contractor in its said reply thereto states that it "will comply with all the provisions contained therein," which reply was conclusively an unqualified acceptance, and effected a meeting of the minds of the parties on this point to the effect that delivery was to be made at Manila.

If, on the other hand, it should be held that the contractor's silence in its reply of August 28 on this question of place of delivery was acquiescence in the insular division's original proposition for delivery at Manila, and therefore equivalent to an agreement thereto, then there never was any misunderstanding whatever between the parties on this point; and it was, *throughout* the contract negotiations, clearly understood and agreed by both parties that delivery should be made at Manila; for, in the next letter from the insular division, August 28, to the contractor, delivery was distinctly specified f. o. b. Manila, and the contractor's final letter in reply thereto stated that all the provisions therein would be complied with.

As further evidence that delivery was to be made at Manila, we have the contract provision

making payment for the paper dependent upon *invoice verification at Manila*. In the insular division's first letter, one of the conditions specifically stated was, "payment to be made from Philippine funds on invoice verification at Manila;" while in the contractor's reply thereto this same condition was included and expressed in identically the same language, and it was ratified in the remainder of the contract correspondence, or negotiations. It seems to us that the only sensible, or reasonable, interpretation that can be given this contract provision is that payment was not to be made until, and *unless*, the paper was delivered at Manila and a comparison with the invoice had been made showing the full amount of the paper to have been delivered, which certainly meant that delivery was to be made at Manila.

Designation of route, carrier, and consignee.

The selection of the route, carrier, and consignee by the insular division did not modify or in any way affect the plain provision and requirement of the contract for delivery at Manila, for the following reasons:

The designation of the route, carrier, and consignee was either a part of the contract provisions, or it was merely a recommendation of the insular division which the contractor was in no way bound or under legal obligation to accept and act upon.

If it be held—as seems to us clear—that these

conditions were a part of the contract terms and requirements, then they could not be held to waive or in any way affect the distinct and unequivocal provision agreed upon at identically the same time, in the same correspondence, for delivery at Manila.

The insular division, in its counter proposal of August 28, said, in effect, that it would take the paper upon the terms theretofore agreed upon *if the contractor would deliver it f. o. b. Manila and would ship it via Suez Canal, through Barber & Co., S. S. agents, consigned to Governor W. H. Taft;* and the contractor, in its unqualified reply of acceptance of August 30, said it *would comply with all these provisions.*

While, as hereinbefore stated, commercial usage is, that in the absence of special agreement to the contrary delivery by the vendor to the carrier is delivery to the vendee; yet no one will question the right and power of the parties to vary this rule by contract provisions requiring delivery to be made at the point of final destination; and so also while commercial usage, in the absence of agreement to the contrary, accords to the vendor the selection of the carrier, route, and consignee, where the burden is upon him to deliver to the vendee at the point of destination, yet this right of selection likewise may be surrendered by special agreement, and this is what was done in the case at bar.

These conditions were, therefore, plain contract provisions into which the parties had a perfect right

to enter; and the route, carrier, and the consignee were fixed and designated by the contract itself.

And, further, as to the fact of the consignment of the goods to Governor Taft; even were this not one of the contract provisions, it would afford no material proof of any intention on the part of the parties to the contract to waive the plain and unequivocal provision of the contract requiring delivery to be made at Manila, or of intention that the shipment was to be at the vendee's risk, as the consignee is as often the mere agent of the shipper as he is the owner of the shipment. (Benjamin on Sales, 282, 289; *Dunlop* v. *Lambert*, 6 C. & F. 621, 622; *Moakes* v. *Nicolson*, 19 C. B., 290; *Castle* v. *Playford*, 5 Ex. L. R., 165.)

And as to the delivery by the contractor of copies of bills of lading to the insular division, this furnishes no evidence of transfer of title and an imposition upon the vendee of the risk of transportation, as this was also one of the specific contract provisions, and especially since Governor Taft was, under the contract, the consignee and the bills of lading were delivered to the insular division for transmission to him, in order that he might secure the delivery of the paper. (*Dunlop* v. *Lambert*, 6 C. & F., 620–621; *Moakes* v. *Nicolson*, 19 C. B., 290; *Shepard* v. *Harrison*, 4 Q. B. L. R., 196; *Castle* v. *Playford*, 5 Ex. L. R., 165; *Kitson Machine Co.* v. *Holden*, 74 Vt., 104; *Congar* v. *R. R. Co.*, 17 Wis., 477; Abbott on Shipping, pp. 326, 331, 337.)

In the court below the contention was made in behalf of the contractor that under the provisions of the contract the freight charges from New York to Manila were not a part of the purchase price of the paper, but were merely prepaid by the contractor, *acting for the Government*, by whom the contractor was afterwards reimbursed therefor, and that this alleged payment of the freight by the Government is evidence of delivery of the paper to the Government when it was delivered to the carrier in New York.

This contention, however, is groundless, as by the contract the purchase price of the paper was to be its value at Government Printing Office rates *plus the freight charges from New York to Manila*. The value of the paper at Government Printing Office rates was $3,087.75 and the entire freight charges from New York to Manila were $197.35, making the total *contract price* of the paper $3,285.10.

It is certainly clear that the freight charges were *a part of the contract price* of the paper, and further that the object of the insular division in contracting in this way was to carry out the purpose of *making Manila the point of delivery, and the contractor responsible for the arrival of the goods and their delivery there in good condition.* There could have been no other material reason for thus making the freight charges a part of the contract price of the paper.

As conclusively sustaining the Government's contention that the selection of the carrier, route of shipment, and consignee, the delivery of duplicate bills of lading, and the alleged payment of freight charges by the Government in no way affect or abrogate the contract provision for delivery at Manila, we call attention to the leading case of *Dunlop* v. *Lambert*, *supra*, in which Lord Chancellor Cottenham, after referring to the *general* rule of law that delivery to the carrier is delivery to the vendee, says:

> But though the authorities all establish the general inference I have just stated, yet that general inference is capable of being varied by the circumstances of any special arrangement between the parties or of any particular mode of dealing between them. If a particular contract be proved between the consignor and the consignee—and the circumstances of the payment of the freight and insurance are not alone conclusive evidence of ownership—as where the party undertaking to consign undertakes to deliver at a particular place, the property until it reaches that place and is delivered according to the terms of the contract is at the risk of the consignor. And again, though in general following the directions of the consignee and delivering the goods to a particular carrier will relieve the consignor from the risk, he may make such a special contract that, though delivering the goods to the

> carrier specially intimated by the consignee, the risk may remain with him. * * * In an infinite variety of circumstances the ordinary rule may turn out not to be that which regulates the liabilities of the parties.

In the court below some stress was laid by opposing counsel upon the fact that in the printed note accompanying the insular division's letter of August 28 and referred to therein, giving the name and location of the shipping agent, and the freight rates that had been arranged for, there were references to f. o. b. delivery at Jersey City, and to reimbursement for the cost of the ocean freight charges to Manila. This note, which is set forth in the fourth finding of fact (pp. 10–11, Transcript), was, in the light of the whole contract negotiations, clearly intended merely as a matter of information as to the location of the shipping agent, Barber & Co., and the freight rates that had been arranged for and could be secured, and can not be held to waive or change the plain contract provision for delivery at Manila, *which was specifically called for in the letter with which the note itself was inclosed.* Such clearly erroneous expressions in such an informal and unsigned inclosure certainly are not to be held to change a plain and specific contract provision contained in the very letter with which the inclosure was transmitted, and when it was clearly not intended to change the requirement of delivery at Manila.

As to the reference in this note to reimbursement for the cost of the ocean shipment, this language was obviously not intended to change the unambiguous language of the contract correspondence, which clearly made the freight charges *a part of the purchase price;* and it is further to be noted that this very language as to the reimbursement of freight charges itself indicates that no payment was to be made until the paper was delivered at Manila, as it states that payment would be made "upon invoice verification at Manila."

There was a second note received by the contractor from the insular division, as set forth in the fifth finding, before shipment had been made; but as it was merely to correct or change the location of the shipping agent from Jersey City to Brooklyn, and was identical with the first note in all other respects, it calls for no special consideration.

We submit that the contract must be construed to have required delivery of the paper at Manila, and in good and serviceable condition, and that as only a part of it was delivered there and that in such a condition as to be wholly unfit for use, and as the Philippine government refused acceptance of the paper and never used any of it, there can be no recovery in the premises.

As to the contract requiring delivery of the paper *in good and serviceable condition*, this is one of the implied conditions of such a contract. An executory contract of sale carries with it an obli-

gation that the property shall be merchantable, and in condition for the use for which it was intended. (Benjamin on Sales, sec. 645; *McClung* v. *Kelley*, 21 Ia., 508, and cases therein cited.) And in this connection it is to be noted that the inspection provided for by the contract at the insular division was merely an inspection, by sample, as to the *initial quality* of the paper.

We wish here to call especial attention to the fact referred to above, that neither the United States Government nor the Philippine government accepted, or ever received any benefit from, any of this paper. The Court of Claims, in the next to the last paragraph of its opinion, says:

> The defendants' officers, as consignee, also treated the goods as goods belonging to the Government by subjecting them to the condemnation of boards of survey, and by selling them without seeking authority for so doing from the claimant and by neglecting to account for the proceeds thereof.

The court, however, was in error in this statement, as appears from the facts set forth in the tenth, eleventh, and twelfth findings of fact (pp. 12–14, Transcript), all of which facts, however, were not disclosed by the evidence and included in the findings of fact as they stood when the opinion was rendered.

As appears from the findings cited, the only board of survey which passed upon and condemned any part of the paper, was the board of

survey convened by the *ship's* agents at Singapore, which condemned the 90 reams that were sold by said agents at that point, the proceeds of which do not appear to have been claimed or received either by the contractor, the Philippine Government, or the United States Government.

As to the 410 reams of the paper which reached Manila in a damaged condition, the findings not only *do not* show that it was treated as belonging to the Government, but, on the contrary, show conclusively that the paper was not in any sense treated as belonging to the Government, but was treated throughout as belonging to the contractor. The paper was not "subjected to condemnation by boards of survey," but in order to protect the Philippine government in its action in not accepting the paper, and also for the protection of the interests of the contractor, who had no agent at Manila, an *inspection committee* was convened by the civil governor, at Manila, to investigate and report as to the damaged condition of the paper and the cause thereof, etc. This committee investigated and reported the facts in the matter and recommended that the paper be held by the Philippine public printer *for the contractor*, until the contractor could be notified and should give instructions as to what disposition it desired made of the paper.

The contractor was notified accordingly, but instead of directing disposition of the paper, it denied any responsibility or interest in the matter,

claiming that its reponsibility for the paper ceased when it was delivered to the carrier at New York. After the paper had lain in storage for over a year, subject to the orders of the contractor, the Philippine Commission, by regular resolution, authorized its advertisement and sale, the proceeds of sale to be paid to the contractor after deduction of costs of sale and storage charges; and it was accordingly advertised and sold at public sale, to the highest bidder. The proceeds of the sale, however, were less than the costs of sale and storage charges on the paper; hence there was nothing left to transmit to the contractor, who, at all stages of the proceedings, and immediately after the sale of the paper, was duly and fully informed of all the facts in the case and of the action taken.

It thus conclusively appears that throughout the entire matter the paper was treated by the Government authorities as belonging to the contractor, and there was never, at any time, any action whatever by the officers or authorities, either of the United States Government or of the Philippine Government, indicating a claim of ownership of the paper.

Risk in him who undertakes to deliver.

If the court sustains the Government's contention that the contract called for delivery at Manila, then the contractor has no right of recovery, as it is well settled that in contracts for the sale and delivery of property the risk of damage or loss of

the property follows the title (*Grant* v. *United States*, 7 Wall., 331; *Oil Company* v. *Van Etten*, 107 U. S., 325, 333; *McConihe* v. *R. R. Co.*, 20 N. Y., 497); that the title does not pass until delivery is made according to contract (*Grant* v. *United States*, 7 Wall., 331; *Pacific Iron Works* v. *L. I. R. R.*, 62 N.Y., 272; *Magruder* v. *Gage*, 33 Md., 348; *Blackwood* v. *Cutting*, 76 Cal., 212); and that the risk is therefore in him who undertakes to deliver.

Am. & Eng. Ency., 2d Ed., vol. 24, p. 1050.

Benjamin on Sales, sec. 330, 693.

Grant v. *United States*, 7 Wall., 331.

Buckingham v. *Dake*, 112 Fed. R., 258.

Pacific Iron Works v. *L. I. R. R.*, 62 N. Y., 272.

Taylor v. *Cole*, 111 Mass., 363.

McConihe v. *N. Y. & E. R. R. Co.*, 20 N. Y., 496.

Dunlop v. *Lambert*, 6 C. & F., 620–622.

Castle v. *Playford*, 5 Ex. L. R., 165.

In the American and English Encyclopedia of Law (*supra*) the law as to title and risk is stated as follows:

> If by the terms of the contract the seller is required to send or forward or deliver the goods to the buyer, the title and risk remain in the seller until the transportation is at an end or the goods are delivered in accordance with the contract, after which time the title is vested in the buyer.

In the case of *Grant* v. *United States* (7 Wall., 331) the contractor, Grant, had a contract for the delivery of commissary and quartermaster supplies at certain posts in Arizona, at certain stipulated rates, there being no provision for making an inspection of the supplies elsewhere than at the points of delivery. The Government officers required the inspection of certain supplies ordered of the contractor to be made in New York City prior to shipment by the contractor, which supplies were captured by Confederate forces while in transit to their destination in Arizona. The contractor brought suit against the Government for the purchase price, contending that by requiring inspection of the supplies at New York the contract provision for delivery in Arizona had been waived; that the inspection of the supplies in New York City effected delivery and passing of title to the Government there, and that the property was thereafter at the risk of the Government.

In delivering the opinion of this court, Mr. Justice Davis stated (pp. 336, 337) that the property did not vest in the United States until it was delivered, and that in such cases "the rule of law applies that where property is destroyed by accident the party in whom the title is vested must bear the loss."

In the case of *Buckingham* v. *Dake* (112 Fed. R., 258) the principal question to be determined

was when title passed, and in its opinion the court said:

> The general rule governing contracts of sale of personal property is that if the delivery is to be made at a certain place, the vendor's title is not divested until delivery is made at that place; and until delivery is made the vendee has acquired no title. A *contract* of sale may be complete before then, but the *sale* is not complete until the delivery is made according to the terms of the contract.

In *Pacific Iron Works* v. *L. I. R. R.* (62 N. Y., 272), the plaintiff contracted to furnish to the defendants certain goods to be shipped from Bridgeport, *by the steamer City of Bridgeport*, and delivered at Peck Slip, New York City, free of charge, the defendant requesting and being given notice of shipment. The goods were shipped according to contract and arrived in due time at Peck Slip, the point of delivery. Upon the question as to when title to the property passed, the court in its opinion said:

> By the contract as found the goods were at the risk of the plaintiff while in transit. * * * The carrier under this arrangement held the goods at the risk of the plaintiffs until the vessel and goods reached the place of delivery.

The attention of the court is especially called to the fact that in this case, as in the case at bar, the

contract called for the shipping of the goods by a *designated* carrier.

In *Magruder* v. *Gage* (33 Md., 348), the court, in discussing the questions of risk and passing of title, said:

> If the vendor undertakes to make delivery himself at a distant place, thus assuming the risk in the carriage, the carrier becomes the agent of the vendor and the property will not pass until delivery is actually made.

In the case of *Castle* v. *Playford* (5 Ex. L. R., 165) the plaintiff contracted to sell the defendant a cargo of fresh-water ice, to be shipped on board a vessel to any port of the United Kingdom designated by the defendant, the vendor to forward bills of lading to the purchaser, upon receipt of which the purchaser was to take upon himself "all risks and dangers of the seas," the purchaser to buy and receive the ice on its arrival, and pay for it in cash on delivery. The vessel and cargo were lost at sea during the voyage by "risks and dangers of the seas," after receipt of bill of lading by the purchaser, and the plaintiff, the vendor, brought suit against the purchaser to recover the value of the cargo.

The court held, in substance, that notwithstanding the contract provision that the risk should be borne by the purchaser after his receipt of the bill of lading, there could be no transfer of the title and risk to the purchaser until the cargo was deliv-

ered at the port of destination, and therefore that the plaintiff had no right of recovery.

It is particularly to be noted that in this case, as in the case at bar, the bill of lading was delivered to the purchaser; and, further, that the decision of the court, as appears from the opinions in the case, was based principally upon the fact that under the contract, payment did not become due *until the consignment was delivered at the point of destination*. This is precisely the condition in the case at bar, where payment was to be made upon *invoice verification at Manila*.

In the case of *Dunlop* v. *Lambert* (6 C. & F., 600), in which the principal facts were almost identical with the facts in the case at bar, Dunlop, the vendor, had shipped by Lambert's (the carrier's) vessel, at Edinburgh, a puncheon of spirits consigned and to be delivered to one Mathew Robson, the vendee, at Newcastle, the freight being paid and the consignment insured by the vendee—though done directly by the vendor at the vendee's request—and the invoice and bill of lading being forwarded direct to the vendee. The consignment was lost at sea, and the vendor brought suit against the carrier for the value of the property. The carrier set up the defense that on the facts in the case title to the property was not in the vendor at the time of its loss at sea—that the title had passed to the vendee upon delivery to the carrier at Edinburgh, and that the vendor therefore had no cause of action.

In reversing the decision of the lower court holding this defense good, Lord Chancellor Cottenham, in delivering the opinion of the court (pp. 620–622), said:

> We have now to determine whether, in a question between a carrier and the person to whom the carrier is responsible in the event of the property being lost, the sending an invoice to the consignee, by which it appeared that the property had been insured and the freight paid by the consignor and the amount of such freight and insurance charged by the consignor to the consignee, deprived the consignor of the power of suing and of an interest or right to recover the value of the property. It is no doubt true, as a general rule, that the delivery by the consignor to the carrier is a delivery to the consignee and that the risk is after such delivery the risk of the consignee. This is so if, without designating the particular carrier, the consignee directs that the goods shall be sent by the ordinary conveyance; the delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risk of the carriage. And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent.
>
> But though the authorities all establish the general inference I have stated, yet that general inference is capable of being varied by the circumstances of any special arrange-

> ment between the parties, or of any particular mode of dealing between them. If a particular contract be proved between the consignor and the consignee, and the circumstance of the payment of the freight and insurance is not alone a conclusive evidence of ownership, as where the party undertaking to consign undertakes to deliver at a particular place the property, till it reaches that place and is delivered according to the terms of the contract, is at the risk of the consignor. And again, though in general the following the directions of the consignee and delivering the goods to a particular carrier will relieve the consignor from the risk, he may make such a special contract that, though delivering the goods to the carrier specially intimated by the consignee, the risk may remain with him; and the consignor may, by a contract with the carrier, make the carrier liable to himself. In an infinite variety of circumstances the ordinary rule may turn out not to be that which regulates the liabilities of the parties.

It is to be noted that in this case not only were the goods consigned to the vendee, the invoice and bill of lading delivered to the vendee, and the freight paid by the vendee, but the consignment was also insured by the vendee. This decision and opinion seems to us to be a most able enunciation of the law governing the questions involved in the case at bar, not only as the law is held by the English courts, but also as held by the American

courts, though we have found no one case in the American decisions where all the points in question were involved and so fully and extensively covered as in this case.

And further on this question of delivery: The Government authorities would have been under no obligation to have accepted the paper that was delivered at Manila, even if it had not been in a damaged condition, for the reason that only a part of the paper contracted for was delivered or ever arrived at Manila. That the purchaser is not bound to accept delivery of a *part only* of the goods contracted for is too elemental to call for discussion (A. & E. Ency. of Law, vol. 24, p. 1077); and as none of the paper which did arrive was ever accepted and used by the Government authorities, no obligation whatever on their part to make any payment could arise.

In conclusion, attention is called to the provision of the contract making *invoice verification at Manila* a prerequisite of payment for the paper. This provision itself shows clearly that it was intended that delivery should be made at Manila, for the term "invoice verification" could reasonably mean nothing more nor less than a checking of the invoice against the paper actually delivered at Manila to see that the paper delivered was the same, both in quality and in amount, that was called for by the invoice. If this be the correct meaning and intent of this provision of the contract making payment dependent upon invoice verification at Manila,

or upon the contractors rendering invoice verification possible, then payment never became due, and the contractor has no right of recovery, since only a part of the paper was delivered at Manila, and invoice verification was thereby rendered impossible.

Contract Void, No Acceptance or Use, hence No Right of Recovery.

If the court sustains our contention—which also was the contention of Governor Taft, the consignee, at the time of the transaction—that delivery and acceptance of the paper was not effected by delivery to the carrier at New York, there is another complete defense against the claim; for if the United States Government be held a principal party to the transaction, the contract was in violation of law, and void, on account of its not having been reduced to writing and signed by the parties in accordance with section 3744 Revised Statutes, and there can therefore be no recovery on the contract. (*Clark* v. *United States*, 95 U. S., 539; *South Boston Iron Co.* v. *United States*, 118 U. S., 37.)

And while there would have been a right of recovery upon a *quantum valebant* if the paper had been delivered to and accepted and used by the Government, yet there was never any legal delivery, or any acceptance or use whatever of the paper by the Government, at Manilla or elsewhere, and there is therefore no ground for recovery even upon

a *quantum valebant*. (*Clark* v. *United States* and *South Boston Iron Co.* v. *United States*, *supra*; *Monroe* v. *United States*, 184 U. S., 524; *St. Louis Hay and Grain Co.* v. *United States*, 191 U. S., 159.)

In conclusion, upon the whole case, it is respectfully submitted that the appellee has no right of recovery against the United States Government, and that the judgment of the Court of Claims should be reversed.

J. A. VAN ORSDEL,
Assistant Attorney-General.

CHARLES F. KINCHELOE,
Special Attorney.

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OCT 9 1907
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 44.

THE UNITED STATES, APPELLANT,

vs.

R. P. ANDREWS & COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF APPELLEE.

A. A. HOEHLING, JR.,
Attorney for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 28194

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Statement.

In this case judgment was entered in favor of appellee and against the United States December 18, 1905, in the sum of $3,285.10; from which judgment the United States has appealed to this court. The case arose under the following facts, as established by the findings of fact of the court below:

1. During the times embraced herein the executive authority in civil affairs in the Philippine Islands was vested in the president of the Philippine Commission, under the title of Civil Governor, subject, however, to the approval and control of the Secretary of War of the United States; this in accordance with instructions of the President of the United States (*Finding XIII, R., 14*).

2. Subsequently, May 5, 1901, the Secretary of War received cable from the then president of the Philippine Commission, at Manila, in respect of establishing a government printing office, and securing a foreman or superintendent to purchase outfit; in response to which cablegram the Secretary of War directed the Insular Bureau (Division) of the War Department to purchase and forward to Manila the necessary machinery, equipment, and supplies for the establishment and operation of such printing office; and also to secure the services of a competent force of operators therefor; which duty was performed by said Division (*Finding II, R., 8*).

3. On and prior to August 17, 1901, appellee was furnishing and supplying the United States divers papers and stationery, under contract, for use in its various departments; and on said last-named date letter was written to appellee, under instructions from the Chief of Division of Insular Affairs, inquiring whether it would furnish certain paper for the use of the Philippine public printing office, Manila, P. I., as specified in two enclosures accompanying said letter, f. o. b., Manila, P. I., at the price at which the same was then being furnished to the Government Printing Office at Washington, D. C., plus freight from New York; payment to be made from Philippine funds on invoice verification at Manila, P. I.; inspection at Insular Division, where the samples were to be sent; bills for supplies to be submitted, in duplicate, to the Chief of Division of Insular Affairs, for verification of prices at Government Printing Office rates; and copies of bills of lading from New York to be submitted, in duplicate, to the Chief of Division of Insular Affairs for verification of prices at Government Printing Office rates; and copies of bills of lading from New York to be submitted, in duplicate, to Chief of Division of Insular Affairs for verification (*Finding II, R., 8–9*).

4. To that letter appellee responded, August 28, 1901, agreeing to furnish the above lots of paper described at the same prices for which the same were then being furnished to the Government Printing Office, Washington, D. C., plus freight rate from New York to Manila, P. I., with the exception of certain lots particularly mentioned. This letter did not specifically mention f. o. b. Manila, but otherwise assented to the other items set forth in said letter of August 17, 1901 (*Finding III, R., 9*).

5. This letter was immediately followed by an order, in writing, from the Chief of Division of Insular Affairs, War Department, dated August 28, 1901, requesting appellee to deliver f. o. b., Manila, P. I., the articles called for in certain enclosures (accompanying the written order) numbered 1 and 2 (being linen map paper of designated quantity, quality, and size), to be shipped care Barber & Co., steamship agents, Pier B, Pennsylvania docks, Jersey City, N. J., marked "Governor W. H. Taft, Manila, P. I., for Philippine public printing plant," as per agreement in appellee's letter, dated August 28, 1901.

Accompanying the written order were enclosures 1 and 2, as above, enclosure 1 containing description of quantity, quality, size, and agreed price, and enclosure 2 containing a notation that the shipment was to be made "Care Barber & Co., steamship agents, Pier B, Pennsylvania docks, Jersey City, N. J.," with the added statement that special arrangement had been made so that, after f. o. b. delivery at Jersey City, the freight rate for the transportation would not be higher than $11.05 per ton (dead weight) and possibly less; the cost of the ocean shipment to be reimbursed appellee by the Philippine government, upon invoice verification at Manila (*Finding IV, R., 10–11*).

6. Prior to the shipment, however, appellee received from the Division of Insular Affairs an additional note and order to ship "Care Barber & Company, East Central pier, Brook-

lyn, N. Y.," with the added explanation just as last hereinabove, with the exception that, instead of describing the delivery as *f. o. b. Jersey City*, this last written note and order described the delivery as being *f. o. b. Brooklyn*—the only change being from the former instructed f. o. b. delivery at Jersey City to a like f. o. b. delivery at Brooklyn (*Finding V, R., 11*).

7. Appellee acknowledged said order and accepted it, by its letter to the Chief of Insular Affairs, War Department (this city), dated August 30, 1901. Thereupon appellee supplied 500 reams of linen map paper, of the kinds and quality called for by the contract, the same being properly packed for export shipment, marked "Gov. W. H. Taft, Manila, P. I.," in care of Barber & Company, East Central pier, Brooklyn, N. Y., the freight thereon being prepaid by appellee. The value of this paper (embraced in the shipment) at Government Printing Office rates amounted to $3,087.75, and the freight charges thereon from New York to Manila amounted to $196.35, which amount was prepaid by appellee, as also the further sum of $1 for clearance papers (*Finding VII, R., 11*).

8. The shipment was consigned to "Gov. W. H. Taft, Manila, P. I.," in accordance with the terms of the contract, and bills of lading, in triplicate, were issued to appellee accordingly by the steamship company, carrying the shipment, under which delivery of the goods was to be made *to said consignee or his assigns;* and thereupon appellee delivered duplicate bills of lading, covering said shipment, to the Chief of Division of Insular Affairs, War Department, Washington, D. C., in accordance with the terms of the contract (*Findings VIII and IX, R., 12*).

9. Barber & Co., steamship agents, as above, forwarded said consignment of paper per steamship "Indrasamaha," which arrived at Singapore with a portion of her cargo (in-

cluding said consignment) badly damaged by water. Ninety (90) reams of the consignment were condemned by a board of survey, convened by the ship's agents, and sold in Singapore, and the remainder of the consignment, 410 reams, was reboxed and forwarded to Manila; but, on account of its damaged condition, rendering it unfit for the use for which intended, Governor Taft, the consignee, refused to accept it; and the acting civil governor, by executive order, convened an inspection committee to investigate and report as to the condition of the paper, responsibility therefor, etc.; which committee investigated, reported, and recommended that the paper be held by the Philippine public printer until appellee could be notified and could direct what disposition it desired made of the paper (*Finding X, R., 12*).

10. Under date May 31, 1902, the Assistant Chief of Division of Insular Affairs, War Department, wrote to appellee, advising it of the damage to the shipment of paper, as above, etc.; and, in response thereto, appellee wrote to the Chief of Division of Insular Affairs, War Department, June 7, 1892, stating, in substance, that the paper was shipped as per order of said Chief of Division, bills of lading obtained as directed, and his instructions carried out implicitly; that the goods were turned over upon direction of that office to Messrs. Barber & Company, agents of that office in that behalf, at Jersey City, N. J., in good order and condition; whereupon the responsibility of appellee ceased. Said letter requested that the bill, as rendered, be approved for payment (*Finding XI, R., 12–13*).

11. The consignment was not insured by either party; and it appears that the proceeds of the 90 reams of paper sold at Singapore by the ship's agents were not received by any of the parties to the contract; and it further appears that the proceeds of the 410 reams of paper (and which 410 reams were held in the warehouse of the Philippine public

printing office, at Manila, for over a year) were insufficient to pay the costs of sale and storage charge at the rate of $2 per month, etc.; and said proceeds were accordingly turned into the insular treasury as miscellaneous receipts of the Philippine public printing office (*Finding XII, R., 13–14*).

12. Appellee never received any part of the agreed purchase price for said paper, nor for the freight and clearance papers covering said consignment and shipment, prepaid by it, as above stated (*Finding XIV, R., 14*).

Appeal by the United States.

The present appeal, prosecuted by the United States, complains, *first*, that the United States is not bound by the contract herein sued upon; that it is neither a proper party defendant to the suit nor liable for the purchase price of the paper; and, *second*, that the contractor, and not the United States, was responsible for the delivery of the paper in good condition at Manila, P. I., and that the risk of damage and loss in transportation was in the contractor and not in the United States.

These assignments of error, so urged on behalf of the United States, will be considered in the order stated.

1.

The United States is Liable.

Contention is made in this case, on behalf of the Government, that the United States (through its War Department) did not, as matter of fact or law, enter into the contract in suit as principal, but only as agent for the Philippine government, and that therefore there is no liability, in any event, on the part of the United States.

During the times embraced herein the executive authority in all civil affairs in the islands (theretofore exercised by a

military governor) were (under order of the President of the United States) vested in and exercised by the president of the Philippine Commission, under the title of Civil Governor of the Philippine Islands, the exercise of such authority, however, being made expressly subject to the approval and control of the Secretary of War (*Finding XIII, R., 14*).

Thus matters stood when, on May 5, 1901, Hon. W. H. Taft, then president of the Philippine Commission, cabled to the Secretary of War, stating, in effect, that the Commission had decided to establish a government printing office, and requesting a foreman or superintendent to purchase outfit. The Secretary of War *directed* the Insular Bureau of the War Department (really the Insular *Division*, as it was then officially designated) *to purchase* and forward to Manila the necessary machinery, equipment, and supplies for the establishment and operation of such printing office, as well also to secure the services of a competent force of operators therefor; which duty was performed by said Division (*Finding II, R., 8*).

It may be here remarked that the Division of Insular Affairs was a division of the War Department, organized by the Secretary of War, and therefore an agent of the United States Government.

By act of Congress approved July 1, 1902 (*32 Stats., part 1, p. 712*), the Division of Insular Affairs, so organized by the Secretary of War, as above, was continued until otherwise ordered; the same to be thereafter known as the Bureau of Insular Affairs of the War Department; such Bureau to be in charge of a chief, an officer of the army detailed for that purpose.

Under the former organization of the *Division* of Insular Affairs, the chief thereof was likewise an army officer detailed for that purpose.

Thus the Division of Insular Affairs was first organized by the Secretary of War as a branch or arm, namely, an

agency, of the United States, pertaining and attached to its War Department; and it so continued and remained during all times embraced in this suit; and thereafter, by act of Congress, July 1, 1902, it was given a legislative recognition, as a Bureau of the War Department, and in the same character and capacity in which it had theretofore acted as a *division* of the same Department.

Bearing the above in mind, the situation, in brief, is this: The Secretary of War *directed* one of the divisions of the War Department (namely, the Division of Insular Affairs of the War Department) *to purchase*, among others, the supplies (linen map paper) embraced in this suit; and, in compliance with that direction, the Division of Insular Affairs of the War Department purchased from appellee line map paper, at an agreed price, to the amount of $3,087.75.

Now it cannot be said that this transaction was, in any sense, one between appellee and the Philippine government; nor is it affected, in such sense as to legally eliminate and release therefrom the United States Government, by the fact that the Philippine government or the Philippine public printing office was to ultimately receive the supplies so purchased, or that, in an adjustment of accounts between the United States and the Philippine government, the funds of the latter were to be subjected to the payment of the cost of the supplies.

The Secretary of War, acting in his capacity for and on behalf of the United States, *directed* a branch of his Department, namely, the Division of Insular Affairs of the War Department, *to purchase* these, *inter alia*, very supplies, and that division made *purchase* thereof accordingly from appellee, under formal written order and acceptance.

The United States, throughout the transaction, acted as *principal;* it authorized and directed the purchase to be made; it required the samples of paper to be inspected, as to quality, at the Insular Division of the War Department, and it made the purchase from appellee.

Therefore, it is submitted, the contract of purchase was one directly between the United States and appellee.

Authorities are cited in appellant's brief to the effect that the National Government is not liable or responsible for the contract obligations or debts of the Territories; also like decisions that the several States are not liable for the obligations or debts of the respective counties thereof (Appellant's Brief, *pp. 24–28*).

It will not be here necessary to specifically comment upon those decisions, since the principle may be conceded, although the cases cited only indirectly settle the doctrine by implication.

The proposition here, as well as below, contended is, that the United States was the principal in the contract in suit, and as such is liable to appellee.

2.

Paper Delivered According to Contract.

Passing now to the further question presented by this appeal, it is to be noted that the contract made with appellee was for paper of the value (agreed) of $3,087.75; that appellee was directed to pack the same for export shipment to Manila, P. I. (via Suez canal), the same to be marked (*i. e.*, consigned) to "Governor W. H. Taft, Manila, P. I.," and to be shipped (*i. e.*, delivered) "Care Barber & Co., steamship agents, East Central pier, Brooklyn, N. Y.," and duplicate bills of lading to be delivered to the Chief of Division of Insular Affairs, War Department, Washington, D. C. (*Finding IV, R., 10–11*).

Appellee followed the instructions and requirements aforesaid, but thereafter the paper was so damaged in transit (without fault of appellee) as to practically unfit it for the use for which it was purchased.

The question, therefore, presented by this record is, Upon whom must the loss fall—the vendor or vendee?

At the outset, it may be well to consider and dispose of a contention insisted upon by appellant, namely, that the contract between the parties contemplated and required a delivery of the paper by appellee at Manila, P. I.

Had that been the real intention between the parties, it would have been exceedingly simple to have so expressed it in apt and absolutely unmistakable language; whereupon appellee could have protected itself by taking out insurance.

On the contrary, however, the language of the contract conclusively negatives any such contention; and it further shows that inspection of samples of the paper was to be made at the Insular Division of the War Department; thus further enforcing the fact that appellee was unwilling to postpone legal delivery of the paper until its arrival at Manila.

Appellant inquired of appellee if it would furnish, for the use of the Philippine public printing office, at Manila, P. I., certain (described) papers, at certain (specified) prices—

"f. o. b. Manila, * * * plus freight from New York, payment to be made from Philippine funds on invoice verification at Manila, P. I.

"Inspection at Insular Division, where samples are to be sent.

"Bills for supplies to be submitted, in duplicate, to the Chief of Division of Insular Affairs, for verification of prices * * *

"Copies of bills of lading from New York to be submitted, in duplicate, to Chief of Division of Insular Affairs, for verification" (*Finding II, R., 8–9*).

It is thus seen that the words, "f. o. b. Manila," appearing in said request for proposal, were not used in their ordinary commercial sense and meaning, that meaning being immediately qualified, in the same sentence, by the provision that vendor should receive a specified price for the paper, "plus freight from New York; payment to be made from Philippine funds on invoice verification at Manila, P. I."

Hence, the requirement was simply that the vendor should *prepay* the freight from New York to Manila, and be *reimbursed* therefor—a condition directly the reverse of "f. o. b. Manila," had that requirement been unqualified.

In fact, the use of the expression "f. o. b. Manila" in the letter of inquiry was inapt and did not accurately describe the situation.

That appellee realized the difference between an ordinary shipment to a given point, *f. o. b.*, and the mere *prepayment* of freight by consignor, to be *reimbursed* by consignee, is clearly shown in its reply to appellant's request for proposal, August 28, 1901, wherein it agrees to furnish the papers (described) at the prices (specified), "plus freight rate from New York to Manila, P. I." It did not use the words "*f. o. b.*" This was appellee's proposal (*Finding III, R., 9*).

Then followed appellant's acceptance:

"Please deliver f. o. b. Manila, P. I. (via Suez canal), the following: * * *

"To be properly packed for export shipment.

"Ship care Barber & Co., steamship agents, pier B, Pennsylvania docks, Jersey City, N. J. (See note inclosed.)

"Marked as follows:

"No. —. Governor W. H. Taft, Manila, P. I.

* * * * * * *

"For Philippine public printing plant.

"As per your agreement in your letter dated August 28, 1901." * * * (*Finding IV, R., 10.*)

The note inclosed gave directions as to shipment by Barber & Co., steamship agents, as above; and it also contained the following:

"A special arrangement has been made so that after f. o. b. delivery, as above, at Jersey City," etc. (*R., 11*).

Here, it will be noted, appellant correctly describes the exact legal situation, namely, "*f. o. b. delivery, as above, at Jersey City.*"

Subsequently appellant sent a further note of instructions to appellee, as to shipment, merely changing designation of

pier (same steamship agents,) from pier B, Pennsylvania docks, Jersey City, N. J., to East Central pier, Brooklyn, N. Y.; and again adds:

"A special arrangement has been made, so that after f. o. b. delivery, as above, at Brooklyn," etc. (*R., 11*).

Thus, again, appellant correctly described the exact condition, namely, "*f. o. b. delivery, as above, at Brooklyn.*"

It must, therefore, result that, so far as the condition *f. o. b.* entered into this contract at all, it was completely satisfied and ended upon delivery of the consignment to the steamship agents, at East Central pier, Brooklyn, N. Y., designated by appellant.

The expression "*f. o. b.,*" in its ordinary acceptance and use, means simply "free on board"—that is, that the expense of carriage and delivery of a consignment at a given point shall be paid by the consignor:

Ex parte, China Clay Co. (*11 Ch. Div., 565*).
Stock *vs.* Ingles (*12 Q. B. Div., 573*).
Brown *vs.* Hare (*3 H. & N., 484*).
Silberman *vs.* Clark (*96 N. Y., 522*).

As has been already referred to, the written contract itself absolutely negatives the contention that any obligation rested upon appellee to make delivery of the consignment f. o. b. Manila. The mere fact that appellee, at the request and for the convenience of appellant, *prepaid the freight* from New York to Manila cannot alter the fact that the vendee itself assumed and agreed to pay such freight by reimbursement of the amount so paid. The legal obligation of appellee was exactly and accurately expressed in the two notes of instruction as to shipment above referred to, namely, "*f. o. b. delivery, as above, at Jersey City,*" and "*f. o. b. delivery, as above, at Brooklyn,*" (*R., 11*).

Aside from the matters now referred to, there are additional facts which should determine the liability of appellant.

Appellant explicitly and in detail directed appellee in respect of every consideration necessary to determine and fix its liability, so far as the question of *delivery* is concerned, thus:

(*a*) to be sent via Suez canal;
(*b*) to be properly packed for export shipment;
(*c*) to be marked (*i. e.*, consigned to) "Governor W. H. Taft, Manila, P. I.";
(*d*) to be delivered f. o. b. Brooklyn, N. Y., to Barber & Co., steamship agents, East Central pier, Brooklyn, N. Y.;
(*e*) freight to be prepaid by consignor, and thereafter reimbursed; and
(*f*) duplicate bills of lading to be delivered to Chief of Division of Insular Affairs (*Findings IV and V, R., 10–11*).

Appellee had no choice in respect of the performance of said conditions and requirements; the steamship agents were the shipping agents designated by appellant, and not the agents of the vendor; and appellee exactly and literally complied with each requirement (*Findings VII, VIII, and IX, R., 11–12*).

Under such circumstances, the goods having been damaged *in transitu*, and so rendered unfit for use, through no fault of the vendor (appellee), upon whom is the loss to fall?

If delivery of the goods to appellant, under the above facts, was accomplished upon delivery to the designated shippers (Barber & Co.), then it results that appellant is liable, and that the risk of damage and loss in its transportation from New York to Manila was in it and not in the vendor.

Ordinarily, and in the absence of anything appearing to the contrary, delivery of goods by a consignor to a common carrier is, *prima facie*, a delivery to the consignee:

Dutton *vs.* Solomonson (*3 Bos. & Pul., 582*).
Dawes *vs.* Peck (*8 T. R., 330*).
Dunlap *vs.* Lambert (*6 Clark & Fin., 600*).
Prince *vs.* Railroad Co. (*101 Mass., 542*).
Kelsea *vs.* Ramsey (*55 N. J., 320*).
Orcott *vs.* Nelson (*1 Gray, 536*).

Where, however, the purchaser *designates* the mode of conveyance and a particular carrier, the latter becomes the agent of the purchaser, and delivery to such carrier constitutes, in law, a delivery to the purchaser:

Vale *vs.* Bayle (*Coup., 294*).
Dawes *vs.* Peck (*8 T. R., 330*).
Dunlap *vs.* Lambert (*6 Clark & Fin., 600*).
Mary and Susan (*1 Wheat., 26, 39*).
Putnam *vs.* Tillotson (*13 Metc., 517.*)
Merchant *vs.* Chipman (*4 Allen, 362*).
Spencer *vs.* Hale (*30 Vt., 314*).
Stanton *vs.* Eager (*33 Mass., 467*).
Magruder *vs.* Gage (*33 Md., 344*).

The true doctrine is thus accurately stated by the court in the case of Spencer *vs.* Hale (*supra*):

"It is a well-known rule in the law of sales, that a delivery of goods to a carrier designated by the purchase is of the same legal effect as a delivery to the purchaser himself."

The case of Buckingham *vs.* Dake (*112 F. R., 258, 270*), cited in appellant's brief is not of any controlling importance in this case, since there the facts were essentially different, as indicated in the opinion:

"When the vendor by the terms of the contract is to pay the freight to the place of delivery, the place of delivery becomes the place of sale, and title is not divested until the transportation is at an end" (citing authorities).

Here, however, the freight was not at the cost of the vendor. The vendor, at request of vendee, agreed to prepay the freight, but the cost thereof was to be reimbursed the vendor; hence the freight constituted no part of the purchase price.

So, again, the case of Grant *vs.* United States (*7 Wall., 331*), cited in appellant's brief, involves a contract calling for delivery at a specified point, nothing being stipulated as to the cost of transportation or manner of transportation. It was held in that case, that a preliminary inspection of the

commodities, made in New York city, did not accomplish a delivery there, under the contract there under consideration, which, in certain terms, required delivery to be made in Arizona.

The case of Dunlop *vs.* Lambert (*6 C. & F., 600, 620–622*), while cited in appellant's brief in support of the proposition that contracting parties may specially change the ordinary legal presumptions and rules touching the relative rights and liabilities of vendors and vendees, thus (opinion), however, admits the ordinary rule to be as here contended:

"It is no doubt true, as a general rule, that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is after such delivery the risk of the consignee. This is so if, without designating the particular carrier, the consignee directs that the goods shall be sent by the ordinary conveyance; the delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risk of the carriage. And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent. * * * And again, though in general the following the directions of the consignee and delivering the goods to a particular carrier will relieve the consignor from the risk, he may make such a special contract that, though delivering the goods to the carrier specially intimated by the consignee, the risk may remain with him; and the consignor may, by a contract with the carrier, make the carrier liable to himself. In an infinite variety of circumstances, the ordinary rule may turn out not to be that which regulates the liabilities of the parties."

The above authority, in its statement of the doctrine, is quite as useful to appellee as it is claimed to be for appellant. It recognizes the true rule and doctrine to be as here contended; and it affirms (what is not here disputed) the entire freedom of contracting parties to make special agreements and contracts fixing a different measure of right and liability

from that applied by law where the parties have not so *specially* contracted.

Testing the present case by the rules of decision above referred to, it will be observed that the vendee directed the vendor to ship (*i. e.*, make delivery to) care Barber & Co., steamship agents, East Central pier, Brooklyn, N. Y., and it agreed to reimburse vendor the freight charge of the ocean shipment.

Such delivery, made in pursuance of express direction given by the purchaser, constitutes a legal delivery to the purchaser.

And, finally, it made such legal delivery to vendee (appellant), beyond all controversy or question, by further directing the goods to be marked and shipped to its (appellant's) designated consignee, "Governor W. H. Taft, Manila, P. I.," and the duplicate bills of lading to be sent by vendor to vendee, at its Division of Insular Affairs, War Department, Washington, D. C.; with all of which, as so instructed and directed, appellee complied.

These facts conclusively establish, it is submitted, a complete legal delivery of the goods to appellant (vendee).

Thus, in Evans *vs.* Martlett (*1 Ld. Raymond, 271*):

"If goods by bill of lading are consigned to A, A is the owner, and must bring the action against the master of the ship if they are lost."

Again, in Brown *vs.* Hodgson (*2 Camp., 36*), Lord Ellenborough:

"I can recognize no property but that recognized by the bill of lading."

In Griffith *vs.* Indledew (*6 S. & R., 429*), Tilghman, C. J., stated:

"After all these decisions, it would seem strange that there should be any doubt of the efficacy of the bill of lading in passing the legal property to the consignee."

The bill of lading, as expressed in the decisions, is the *symbol* of the property and represents it:

Straus *vs.* Wessel (*30 Ohio St., 211*).
Forbes *vs.* Railroad Co. (*133 Mass., 154*).
Gates *vs.* Railroad Co. (*42 Neb., 379*).
Railroad Co. *vs.* Johnson (*45 id., 57*).
Refining Co. *vs.* Refining Co. (*104 Ky., 559*).
Railroad Co. *vs.* Stern (*119 Pa. St., 24*).
Conrad *vs.* Insurance Co. (*1 Pet., 386*).
Gibson *vs.* Stevens (*8 How., 384*).

In the last case (cited) Taney, C. J., stated:

"A ship at sea may be transferred to a purchaser by the delivery of a bill of sale, so, also, as to the cargo, by the indorsement and delivery of the bill of lading. It is hardly necessary to refer to adjudged cases to prove a doctrine so familiar in the courts. But the subject came before this court in the case of Conrad *v.* The Atlantic Insurance Company, in 1 Pet., 445, where this symbolical delivery was fully considered and sustained."

In Stanton *vs.* Eager (*33 Mass., 467*) it was held that where the consignor took out the bill of lading in the name of the consignee, the latter having designated the carrier to be employed, title passed to the consignee immediately upon delivery of the goods to the carrier, even where the bill of lading was sent by the consignor to his own agent.

So in the case of Straus *vs.* Wessel (*30 Ohio St., 211*) the bill of lading was made out in the name of the consignee, but had not been delivered. The court, nevertheless, held that title passed to the consignee upon delivery to the carrier.

Without further citation of authorities, it cannot be disputed in this case that the purchaser—

(*a*) agreed to pay the freight;
(*b*) directed the goods consigned to Governor W. H. Taft, Manila, P. I.
(*c*) designated the place of delivery, (Brooklyn, N. Y.), and the particular carrier (steamship agents,) to be employed; and,
(*d*) received the bills of lading, in duplicate, covering the goods, (consigned as above.)

Applying the law to the facts, the conclusion is irresistible that the vendor *delivered* the goods to appellant at Brooklyn, N. Y., and that the risk of damage and loss in transportation from New York to Manila was in the United States and not in appellee.

The court below, in its opinion, sums up the case as one of—

"goods delivered and transported according to the very terms of the contract, whereby the defendants acquired possession of the goods and the opportunity to verify the invoice, and where they examined the goods and sold them in their damaged condition" (*R.*, 7).

Before leaving this part of the case, two additional matters referred to in appellant's brief may be noted:

(*a*) It is stated that a purchaser is not bound to accept a *part only* of goods contracted for; and that, inasmuch as only a *part* of the damaged goods (410 reams of paper) actually arrived at Manila (the remaining 90 reams of the consignment having been condemned and sold by the ship's agents at Singapore), therefore, as none of the paper which did arrive was ever accepted and used by the Government, no obligation whatever on its part to make any payment could arise.

This may be true as an elementary proposition of law, but the doctrine is not here applicable, since the contention here is that there was a complete legal delivery of the entire consignment made to the designated agents of the United States at Brooklyn, N. Y.

(*b*) The appellant further comments upon an alleged error of the court below in its opinion, wherein it refers to the fact that the paper was treated as belonging to the Government.

It may be noted that certain additional findings of fact were added after the filing of written opinion herein, which

set forth some details of fact not so fully disclosed in the original findings, but which did not alter the judgment of the court (*R., 7*).

The language of the opinion, however, even when tested by the added findings of fact, is not properly subject to any material or substantial criticism.

Appellant criticizes this language of the opinion of the court below:

> "The defendants' officers, as consignees also treated the goods as goods belonging to the Government by subjecting them to the condemnation of boards of survey, and by selling them without seeking authority for so doing from the claimant, and by neglecting to account for the proceeds thereof" (*R., 7*).

The court was quite correct in its brief reference to what actually occurred: Appellee filled the order for paper as per the contract, which means that it was delivered to the shipping agents of the Government between October 20 and November 1, 1901 (*Findings IV and VII, R., 10–11*); during the ocean transit the consignment was badly damaged by water, and 90 reams thereof were condemned by a board of survey convened by the ship's agents and sold in Singapore; the remaining 410 reams were reboxed and forwarded to Manila, where Governor Taft, the consignee, refused to accept it; but the acting civil governor, by executive order, convened an inspecting committee to investigate and report as to the condition of the paper, responsibility therefor, etc.; that committee investigated and reported, and recommended that the paper be held by the Philippine public printer until appellee could be notified, etc. (*Finding X, R., 12*).

Appellee was accordingly thereafter notified (see letter from Assistant Chief of Division of Insular Affairs, War Department, May 31, 1902—*Finding XI, R., 12–13*), and prompt response made thereto June 7, 1902, in which appellee disclaimed any responsibility for the paper and re-

quested that its bill as rendered be approved for payment (*Finding XIII, R., 13*).

Notwithstanding all this, the paper was kept in the warehouse of the Philippine public printing office for over a year, until May 28, 1903, when it was sold, pursuant to a resolution of the Philippine Commission, and the proceeds, $250, turned into the insular treasury as miscellaneous receipts of the public printing office. True, it is stated that the proceeds were insufficient to pay the costs of sale and storage charges at the rate of $2 per ton per month. (*Finding XII, R., 13-14*). In other words, notwithstanding prompt disclaimer by appellee of any responsibility for the damage, the paper was permitted by defendant's officers to remain on storage for over a year, upon storage charges in its own favor, and which latter ultimately, together with the costs of sale, used up the entire proceeds of the sale.

The language, therefore, of the court below does not appear to be materially different from the findings, even as subsequently enlarged by amendment.

3.

RIGHT OF RECOVERY.

Appellant asserts in this court, for the first time, that in any event the contract sued upon was in violation of law and void, because not reduced to writing and signed by the parties in accordance with § 3744, R. S. U. S., and that therefore there can be no recovery on the contract itself (citing Clark *vs.* United States, *95 U. S., 539;* South Boston Iron Co. *vs.* United States, *118 id., 37;* Monroe *vs.* United States, *184 id., 524,* and Hay and Grain Co. *vs.* United States, *191 id., 159*).

It may be here remarked that this objection was not in any way suggested or raised below; but the case, as the record

will fully disclose, was tried below and disposed of by the court upon the theory of an admittedly valid and legal contract.

Appellant now proposes to dispose of the claim of appellee for the compensation to which it conceives itself to be entitled by asserting, *first*, there can be no recovery herein because there was no legal or valid contract; and while appellee would, nevertheless, be entitled to recover upon a *quantum valebat*, still there can be no recovery herein, even upon that theory, because, *second*, there was no legal *delivery* of the paper to appellant, and thus a recovery under a *quantum valebat* must likewise fall.

This final (*second, supra*) position of appellant, however, really but reverts to the main discussion hereinabove considered at length, both in the Government brief and in this, namely, did the facts accomplish a *delivery* to the United States at Brooklyn, N. Y., when the consignment was delivered to Barber & Co., steamship agents, at the direction of appellant? If so, that disposes of the contention that there can be no recovery herein, even under a *quantum valebat*.

That there was such a *delivery* has been above sufficiently presented, in the light of the facts and decided cases.

Therefore it would seem to necessarily follow that, in any event, appellee is entitled to recover the value of the consignment of paper (and which *value* the court below has found to be, at Government Printing Office rates, the sum of $3,087.75, the freight charges thereon from New York to Manila, $196.35, and cost of clearance papers, $1—*Finding VII, R., 11*), the amount fixed by the contract between the parties being found by the court below without controversy or question.

The cases cited by appellant as to the alleged invalidity of the contract here involved distinctly recognize the right of recovery upon a *quantum valebat*, and further recognize the right of the court, in the absence of controversy, to assume the value to be that stipulated for.

It is respectfully submitted that the judgment below in favor of appellee and against the United States, in the sum of $3,285.10, was correct and should be affirmed.

Respectfully submitted,

A. A. HOEHLING, JR.,
Attorney for Appellee.

WASHINGTON, D. C., *October* 8, 1907.